83-619

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

JOSEPH C. GRAVES,

Petitioner,

v.

THE LEXINGTON HERALD-LEADER COMPANY,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF KENTUCKY

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QUESTIONS PRESENTED

1. Did the court below, a state court of last resort, misconstrue and misapply this Court's public figure libel decisions when it decided it should conduct a *de novo* review of the evidence, and overturned the jury's verdict on the First Amendment issue of reckless disregard of truth or falsity?

2. Did the holding of the court below, that reckless disregard of truth or falsity means conduct approaching "deliberate fabrication," depart from the definitions announced by this Court in its public figure libel decisions beginning with *New York Times Co. v. Sullivan,* and impermissibly equate reckless falsity with conscious knowing falsity?

3. Was the testimony of the reporter who wrote the false news story, (a) that he had substantial doubts of his own story's accuracy and (b) that there was no urgency to publish before checking the facts with the subject of the story, sufficient evidence to support with convincing clarity a jury finding that the newspaper had published the story with reckless disregard of its truth or falsity?

4. Did the state appellate court's substitution of its own verdict for the jury's, disregarding the jury's assessment of the credibility of the witnesses, including the reporter who was the author of the story, deprive plaintiff of property rights in his cause of action for damages for libel and in a jury verdict, without due process of law in violation of the Fourteenth Amendment?

5. When publication of a false news story about a candidate for public office may have affected the outcome of the election, should the news story's effect on the rights of voters to an effective, unimpeded vote, which the First

Amendment protects, be weighed by a court in applying the actual malice test to protect the First Amendment rights of the press in a public figure libel case?

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Joseph C. Graves petitions for a writ of certiorari to review the judgment of the Supreme Court of Kentucky reversing a jury verdict in his favor.[1]

OPINION BELOW

The opinion of the Supreme Court of Kentucky, issued December 28, 1982, is reproduced as Petitioner's Appendix ("App.") A.

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[1]The caption of the case in this Court contains the names of all the parties to this petition. Howard Collins, editor of the Lexington Herald-Leader, was a defendant below but the jury found no liability against him.

JURISDICTION

The judgment and opinion of the Supreme Court of Kentucky were issued on December 28, 1982. App. A. Petitioner's timely petition for rehearing was denied on June 15, 1983. App. B. On August 8, 1983, the time for filing this petition was extended to October 13, 1983, by order of Justice Sandra D. O'Connor.

CONSTITUTIONAL PROVISIONS INVOLVED

First Amendment:

Congress shall make no law . . . abridging . . . the freedom of speech, or of the press . . . .

Fourteenth Amendment:

No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States . . . nor shall any state deprive any person of life, liberty, or property, without due process of law . . . .

STATEMENT OF THE CASE

INTRODUCTION

Petitioner Joseph C. Graves asks this Court to review the decision of the Supreme Court of Kentucky (App. A), which reversed a jury verdict in his favor in a public figure libel action.

The Kentucky Supreme Court substituted its own verdict on the facts for the jury's. It held that it was required to conduct a "*de novo* review" of the evidence, App. 11a, and upon that review held that the evidence did not establish reckless disregard of truth or falsity. In doing so it disregarded the jury's necessary determinations of credibility.

The state court's decision exceeds this Court's limitation on the appellate role in such cases. In *Time, Inc. v. Hill,* 385 U.S. 374, 394 n. 11 (1967), the Court recognized that the jury, not a reviewing court, is to decide whether the defendant published with "reckless falsehood." In *Gertz v. Robert Welch, Inc.,* 418 U.S. 323, 343-44 (1974), the Court rejected the suggestion that appellate courts should "scrutinize carefully every jury verdict in every libel case, in order to ascertain whether the final judgment leaves fully protected . . . First Amendment values . . . .", quoting *Rosenbloom v. Metromedia, Inc.,* 403 U.S. 29, 63 (1971) (Harlan, J. dissenting). In this respect, this case is the state court and jury trial analog of *Bose Corporation v. Consumers Union of United States, Inc.,* 692 F.2d 189 (1st Cir. 1982), *cert. granted,* No. 82-1246 (October Term 1982), in which the Court granted certiorari to review the First Circuit's similar substitution of its own verdict for that of the district court as trier of fact in a bench trial.

Moreover, the state court's definition of the "reckless disregard" test for actual malice, *New York Times Co. v. Sullivan,* 376 U.S. 254 (1964), effectively reads "reckless disregard" out of the law entirely. Its formulation: "conduct which approaches the level of deliberate fabrication," App. 14a, leaves conscious knowledge of falsity as the only test for malice in public figure libel cases. If Kentucky's definition is adopted by other courts, a public figure could vindicate the damage to his reputation in an action for libel only by proving the nearly impossible — that the publisher knew that his publication was false and published nevertheless. If that is henceforth to be the test in a public figure libel case, this Court should establish it.

THE RECORD BELOW

This case arises from a news story published on July 21, 1977, in the afternoon edition of the Lexington Leader, a newspaper of general circulation in Lexington, Kentucky. At the time the story appeared petitioner Joseph C. Graves was in the midst of a campaign for election as Mayor of Lexington. Tr. 24-25.[2] Throughout his political career (he had served in both houses of the Kentucky legislature) petitioner had championed ethical conduct in politics and had urged, by his own example, public officials' and candidates' voluntary disclosure of property and income. Tr. 21-26.

The jury found that the story falsely accused petitioner of falsifying a statement he had issued the previous January, disclosing his real estate property holdings and their value. App. 2a.

The Libelous News Story

The Leader's interest in Graves' financial disclosure statement and his holdings began with a telephone call to a reporter for the paper, John Alexander, from one Tim Green in January or February of 1977. Green told Alexander that he had "information about Joe Graves and his property holdings." Green gave Alexander a stack of documents about Graves, and Alexander spent about five months examining them, between other assignments. Tr. 565-69. Finally, in June 1977, Alexander wrote down a number of questions about petitioner's January financial statement. After showing the questions to the Leader's editor, Howard Collins, Tr. 321, on June 28 Alexander

[2] "Tr." references are to the trial transcript.

gave the questions to petitioner and asked to meet with him the next day to get his answers. Tr. 28, 569.

When Graves read the questions, he realized he needed some time to research the answers. He also was concerned about the potential hostility of the newspaper to his campaign because of its president's close friendship with his opponent. Tr. 29-31. Graves called Collins and asked for time to answer the questions, to which Alexander and Collins agreed. Tr. 31, 569-70. A week later Graves wrote Collins that he needed more time to prepare a full statement respecting his financial holdings, that he would have a news conference on Friday, July 22, and would discuss the subject at that time. He invited Alexander and Collins to attend the press conference. Tr. 32-35, 429-30. Graves then left on vacation.

Alexander testified that he was not especially concerned when he learned that Graves had decided to answer his questions at a press conference to which other reporters would be invited. Nevertheless, he asked Collins what he should do in light of the upcoming press conference. Collins told Alexander to write the story. Alexander wrote a story, turned it in and left for his vacation, still believing that the questions he had submitted to Graves had to be answered before the story would run. Tr. 571-74. Alexander had no particular interest in a "scoop", Tr. 574-76, did not care about an "exclusive" on the Graves story and did not feel that the story was particularly newsworthy nor that it was crucial that it appear at the time it did. The facts were matters of public record, "some of them for a great many years." Tr. 583.

The editors who were put in charge of the story (and the paper; Collins also had gone on vacation) contradicted Alexander. They claimed that they ran the story only because of extreme pressure from Alexander, who they said

wanted a "scoop". Tr. 293. Robert Fain, the paper's news editor, said that he had decided to run the story on July 21, to beat Graves' press conference scheduled for the following day, even though he recognized that it was "senseless" and would have a "negative" impact on Graves. Tr. 357-58. Richard Schwein, copy editor, testified that although the editors "felt very strongly" that the paper should get Graves' comments before the story ran, Tr. 374, their reservations were overcome by a "stampede instinct" to run the story. Tr. 377.

Alexander testified that at the time he wrote the story and turned it in, he had serious doubts about whether the story he had written was true. He "was not convinced of the story's completeness", he "had questions [he] wanted answers to . . . Joe [Graves] needed to be talked to" and as a consequence Alexander "did not know exactly the status of the story." Moreover, he "had doubts that the story was especially pertinent." As he testified, "I was not sure the story was exactly accurate. The documents were complicated . . . . I was having a great deal of trouble understanding the documents themselves." Tr. 572.

Alexander had no doubt about the likely impact of the story. He had told Graves' campaign manager "the story was going to run and that if it ran without [Graves] responding it would probably crucify him." Tr. 576.

Alexander testified again and again to his "doubts as to the accuracy of the story." Tr. 589. He "did not understand the entire arrangement" about which he wrote in the story. Tr. 618. He did not want the story to run because "it was wrong." Tr. 693. He had "specific doubts" that he understood the future interests in real property that were the subject of the story. He was uncertain about a transaction involving a lease to Montgomery Ward. Indeed, he "was not completely sure that [he] had the complete infor-

mation on *anything*." Tr. 590 (emphasis added). Not only was he not convinced that he had the information he needed; even as to the information he had, he was not convinced that he "knew what it meant." *Id.*

The testimony was undisputed that Timothy Green and Robert Miller, the two lawyers who had instigated the story and who had supplied Alexander with the information he relied on, were political enemies of Graves. Tr. 516-17, 531, 776. The paper's publisher, Black, agreed that Miller and Green were "out to get Mr. Graves" and used Alexander to do so. Tr. 776-77.

Graves returned to Lexington from his vacation on July 20; the story appeared on the afternoon of July 21, less than 24 hours before Graves' scheduled press conference. Graves immediately recognized that the story was false and a "smear on [his] reputation." Tr. 44-60, 61. A letter was promptly dispatched to the newspaper, Tr. 61-67. Graves held his news conference, discussed his property holdings and refuted the allegations of the story. Tr. 67-70. Nevertheless the story had a "devastating" impact on Graves' campaign and on his political reputation. Tr. 71, 90-92, 93. Campaign volunteers were demoralized. Money raising became difficult; the story had raised questions about Graves' integrity in the minds of potential contributors. Tr. 72. The story may have affected the outcome of the election – which Graves' opponent won. Tr. 393.

The Paper's Reaction

Creed Black, the Leader's publisher, did not read the story until after it had appeared. When he read it he found a statement that "obviously" didn't "make sense," found that the "numbers" (in a story about financial holdings that charged false disclosures!) didn't "add up," Tr. 284-85, and found, when he questioned Alexander, that Alexander himself did not understand the story. Tr. 290.

Black and Collins concluded that Alexander had been "grossly incompetent" and fired him. They also demoted Schwein and Bette Pierce, another editor who had approved the story, Tr. 294. Black admitted that the editors (Fain, Schwein and Pierce) had failed to perform their job of checking the reporter's story for loopholes and inaccuracies. Tr. 311. But it was not until August 5, two crucial campaign weeks after the story had appeared, that the paper published an admission that the story was inaccurate. Tr. 73-75.[3]

The Jury's Verdict

At the close of the evidence the jury returned a verdict for Graves. The jury's vote was unanimous that the article was false (Instruction No. 1)[4] and that it was defamatory (instruction No. 2). The trial court's third instruction to the jury followed *New York Times Co. v. Sullivan*.[5] He instructed the jury that actual malice meant publication of

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[3]In October the Lexington Herald-Leader endorsed Graves' opponent in the general election. Tr. 87.

[4]The instructions are reproduced as Appendix C, App. 27a-31a.

[5]There was no dispute that Graves was a public figure.

the story knowing that the false statements "were false, or with reckless disregard of whether they were true or not." The judge defined "reckless disregard" as "a high degree of awareness of the probable falsity of the statements" or the entertainment by the paper or its employees of "serious doubts as to the truth of [the] statements . . . ." On this instruction the jury returned a nine-to-three verdict for plaintiff.[6] The jury then awarded damages of $100,000 to Graves, also by a vote of nine-to-three. Tr. 841-43.

The Appellate Court's Verdict

The newspaper appealed and the Kentucky Supreme Court reversed, five votes to two. App. 18a. Following what it believed to be this Court's admonition in *New York Times Co. v. Sullivan,* 376 U.S. at 285, the appellate court substituted its own evaluation of the evidence for the jury's, holding that "questions of 'constitutional fact' " like actual malice "compel *de novo* review." App. 11a. While asserting that in reviewing the jury's verdict it was "drawing all permissible inferences in the plaintiff's favor and resolving all questions of credibility in his behalf," the appellate court held nevertheless that the evidence lacked the "convincing clarity" needed to show actual malice under *New York Times Co. v. Sullivan.* App. 11a. The question was whether the newspaper had published the story with reckless disregard of its truth or falsity, App. 12a. The court correctly quoted the definitions of this standard announced by this Court in the cases which followed *New York Times,* App. 13a,[7] but then sum-

[6]Kentucky has a three-out-of-four verdict rule. K.R.S. 29.280(3).

[7]St. Amant v. Thompson, 390 U.S. 727 (1968); Curtis Publishing Co. v. Butts, 388 U.S. 130 (1967); Garrison v. Louisiana, 379 U.S. 64 (1964).

marized the standard as demanding "conduct which approaches the level of deliberate fabrication. . . ." App. 14a.

The court expressly refused to consider as "reckless disregard" Leader reporter John Alexander's self-confessed doubts of the accuracy of his own story, pp. 6-7, *supra*. It accepted the testimony of the paper's editorial staff over Alexander's about whether the story was "hot news." App. 16a. It rejected Green's and Miller's enmity to Graves as reasons to doubt their truthfulness as informants. App. 15a. *Cf. St. Amant v. Thompson*, 390 U.S. at 732.

Dissenting, Justice Stephenson likened the *Graves* facts to those in *Curtis Publishing Co. v. Butts*. He quoted the holding of *Butts*, 388 U.S. at 158, that reckless disregard was established by the publication's "highly unreasonable conduct constituting an extreme departure from the standards of investigation and reporting ordinarily adhered to by responsible publishers." App. 21a. The dissent argued that the question of reckless disregard was "a jury issue," that the "trial court properly submitted this issue of 'reckless disregard' to the jury" and that the verdict should not be disturbed because it was "consistent with the 'reckless disregard' standard upon which actual malice can be based." App. 22a.

The dissent criticized the majority for suggesting that Alexander's testimony did not indicate "a high degree of awareness of the probable falsity of his article," declaring that the majority was acting "as a jury in deciding this question adversely to Graves." App. 23a. In particular, the dissent would have held that the jury could have found reckless disregard of truth or falsity, and hence the requisite malice, from the evidence "that Alexander had told Graves' campaign manager that the story would crucify

Graves . . . . taken together with an absolute failure to investigate complicated legal questions beyond the capability of Alexander to verify." *Id.*

The Kentucky court denied Graves' petition for rehearing by a vote of four to three. App. 26a.

REASONS FOR GRANTING THE WRIT

1. The Reviewing Court Below Improperly Usurped the Jury's Function by Assuming It Should Conduct a *de novo* Review of the Evidence of Reckless Disregard of Truth or Falsity. The Court has Granted Certiorari to Review a Similar Federal Court of Appeals Decision; this Case is the State Jury Trial Counterpart.

This case squarely presents the question of the extent to which an appellate court may re-examine the evidence presented to a jury in a public figure libel case, and substitute its own verdict for the jury's. It is the same question — but in the state jury trial context — presented in the federal bench trial context under Fed. R. App. P. 52 in *Bose v. Consumer's Union of United States,* No. 82-1246 (October Term, 1982), *cert. granted,* 103 S.Ct. 1872 (1983), *opinion below,* 692 F.2d 189 (1st Cir. 1982).[8]

The Court has granted review in *Bose* in order to re-examine this constitutional issue. The Court should grant review here to ensure that on appeal from jury verdicts, state appellate courts correctly apply the standard of

[8] *Bose* was a product disparagement case, but the actual malice test applied there is the same as that applied in public figure libel cases. 692 F.2d at 193.

review which the Court announces for federal courts when it decides *Bose*.

In *Bose* the court of appeals held that it "must perform a *de novo* review, independently examining the record to ensure that the district court has applied properly the governing constitutional law and that the plaintiff has indeed satisfied its burden of proof." 692 F.2d at 195, citing *New York Times Co. v. Sullivan*, 376 U.S. at 285 and *id.* n. 26. Here the Kentucky Supreme Court likewise held that it was required to conduct a "*de novo* review" of the evidence, App. 11a, and overturned the verdict of the jury. In this case the Kentucky Court misconstrued its duty and greatly exceeded its appellate function.[9]

The decisions of this Court do not permit an appellate court to disregard a jury verdict in a public figure libel case and substitute its own verdict by a "*de novo* review." This has been clear since the early cases that followed *New York Times*.

Immediately following *New York Times*, some justices criticized the removal of any function from the jury. In *Garrison v. Louisiana*, 379 U.S. 64, 81 (1964), Justice Douglas asked, "[h]ow can we sit in review on a cold record and find no evidence of malice when it is the commonplace of life that heat and passion subtly turn to malice in actual fact?" (Concurring opinion; citation omitted.) In *Rosenblatt v. Baer*, 383 U.S. 75, 96 (1966), Justice

[9]Both in *Bose* and here the appellate courts gave lip service to the principle that questions of credibility are for the trier of fact, 692 F.2d at 195; App. 11a, and must be resolved in favor of the plaintiff, and then ignored it. *See* pp. 20-24 *infra*.

Black regretted any "step in the direction of holding that a judge rather than the jury is to have the determination of *any* fact in libel cases." (Concurring and dissenting opinion; emphasis added). In *Curtis Publishing Co. v. Butts,* 388 U.S. 130, 171 (1967), Justice Black wrote, "the Court looks at the facts . . . as though it were a jury . . . ." "That," he continued, "seems a strange way to erect a constitutional standard for libel cases. If this precedent is followed, it means that we must in all libel cases hereafter weigh the facts . . . . In the final analysis, what we do in this circumstance is to review the factual questions in cases decided by juries – a review which is a flat violation of the Seventh Amendment." (Concurring and dissenting opinion.)

Writing for the majority in *Time, Inc. v. Hill,* Justice Brennan himself retreated from *New York Times de novo* review. He declared that "where either result finds reasonable support in the record it is for the jury, not for this Court, to determine whether there was knowing or reckless falsehood." 385 U.S., at 394 n. 11. And in *Butts,* in the same term of Court as *Time, Inc. v. Hill,* Justice Brennan sharply criticized the application of *de novo* review to affirm a plaintiff's libel verdict:

> That the evidence might support a verdict under *New York Times* cannot justify our taking from the jury the function of determining, under proper instructions, whether the *New York Times* standard has been met. The extent of this Court's role in reviewing the facts, in a case such as this, is to ascertain whether there is evidence by which a jury could reasonably find liability under the constitutionally required instructions.

388 U.S. at 174 (concurring and dissenting opinion).

From the beginning of the application of the actual malice test, the Court appeared to confine *de novo* review to cases where the trial court had failed to instruct the jury properly on the actual malice standard – as in *New York Times Co. v. Sullivan* itself, *Beckley Newspapers v. Hanks,* 389 U.S. 81 (1967), and *Greenbelt Cooperative Publishing Ass'n, Inc. v. Bresler,* 398 U.S. 6 (1970); *see also Curtis Publishing Co. v. Butts,* 388 U.S. at 138-39 (plurality opinion), 166-69 (concurring opinion of Chief Justice Warren). This, of course, would avoid costly retrials, with their chilling effect on press exercise of First Amendment freedoms. Justice Harlan opposed extending the use of *de novo* review beyond such situations. In *Time, Inc. v. Pape,* 401 U.S. 279, 294 (1971) (dissenting opinion), he objected to "utilizing this Court as the ultimate arbiter of factual disputes in those libel cases where no unusual factors, such as . . . the existence of a jury verdict resting on erroneous instructions, *cf. New York Times, supra,* are present."

Indeed, the Court did not uniformly invoke *de novo* review even in cases of erroneous jury instructions. For example, in the two companion cases to *Time, Inc. v. Pape: Monitor Patriot Co. v. Roy,* 401 U.S. 265 (1971), and *Ocala Star-Banner Co. v. Damron,* 401 U.S. 295 (1971), the Court refrained from entering its own verdict and remanded the cases for new trials on proper instructions. *See Monitor Patriot Co.,* 401 U.S. at 278 (dissenting opinion).

As First Amendment review of libel judgments proliferated, members of the Court began to voice concern for the burden on appellate courts (and indeed this Court) of having to render fact decisions. *Rosenbloom v. Metromedia, Inc.,* was a turning point. There, writ-

ing for the plurality, Justice Brennan conducted an "independent analysis of the record" to approve reversal of a jury's "actual malice" verdict. 403 U.S. at 55. But Justice Harlan warned that the plurality's view would require "scrutiniz[ing] carefully every jury verdict in every libel case." He argued that *New York Times Co. v. Sullivan* did not require such "case-by-case examination of trial court verdicts." 403 U.S. at 63 (dissenting opinion). Justice Marshall similarly criticized the plurality's "ad hoc method" of factfinding as "requir[ing] this Court to engage in a constant and continuing supervision of defamation litigation throughout the country." 403 U.S. at 81 (dissenting opinion). As Justice Harlan had said in *Time, Inc. v. Pape,* "it is . . . impossible to conceive how this Court might continue to function effectively were we to resolve afresh the underlying factual disputes in all cases containing constitutional issues." 401 U.S. at 294 (dissenting opinion).

The Court announced its abandonment of *de novo* review of jury verdicts in libel cases in *Gertz v. Robert Welch, Inc.* Quoting Justice Harlan's remarks in *Rosenbloom,* 403 U.S. at 63, about "scrutiniz[ing] carefully every jury verdict in every libel case," the Court agreed that "this approach would lead to unpredictable results and uncertain expectations, and it could render our duty to supervise the lower courts unmanageable." 418 U.S. at 343. Echoing Justice Marshall's *Rosenbloom* dissent, the Court continued: "Because an *ad hoc* resolution of the competing interests at stake in each particular case is not feasible, we must lay down broad rules of general application." *Id.* at 344-45.

Decisions since *Gertz* reflect a return to recognition of the jury's function and a further retreat from its usurpa-

tion by reviewing courts. *See, e.g., Time, Inc. v. Firestone,* 424 U.S. 448, 458, 460-61 (1976). In *Hutchinson v. Proxmire,* 443 U.S. 111, 120 n. 9 (1979), the Court questioned "the so-called 'rule' " favoring summary judgment in public figure "actual malice" cases, because "a defendant's state of mind . . . does not readily lend itself to summary disposition." If a court should not remove such an issue from jury consideration before trial, surely it should not be permitted to substitute its own view for the jury's after trial and verdict. *See Cantrell v. Forest City Publishing Co.,* 419 U.S. 245 (1974), reversing the court of appeals' reversal of a jury verdict which necessarily found that the defendant "had published knowing or reckless falsehoods." 419 U.S. at 252-53.

It appears, however, as evidenced by the First Circuit's decision in *Bose* and the Kentucky Supreme Court's decision here, that most federal and state appellate courts continue to deem it their duty to assume the jury's function in public figure and public official libel cases.[10] *Gertz v.*

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[10]Lower courts' treatment of trial court verdicts is by no means uniform. For example, in Appleyard v. Transamerican Press, Inc., 539 F.2d 1026, 1029 (4th Cir. 1976), *cert. denied,* 429 U.S. 1041 (1977), the Fourth Circuit applied the traditional (or *Time, Inc. v. Hill*) test, finding in the record "sufficient support for the jury's general finding" of actual malice, without independent, *de novo* review of the evidence. In Davis v. Schuchat, 510 F.2d 731, 735 (D.C. Cir. 1975), the District of Columbia Circuit affirmed a plaintiff's jury verdict, quoting from *Time, Inc. v. Pape* to support review of the evidence – and then quoting the contradictory passage from *Time, Inc. v. Hill* (quoted at p. 13 *supra*), declaring that "it is for the jury," not the court, to decide "whether there was knowing or reckless falsehood."

The Ninth Circuit has interpreted the *New York Times* independent-review-of-the-record rule as not requiring "disregard [of] the usual rules for determining whether a case should go to the jury," Guam Federation of Teachers, Local 1581 v. Ysrael, 492 F.2d 438,

Robert Welch, Inc., indicates that this Court no longer assumes that duty in libel cases. *Time, Inc. v. Hill*, indeed, suggests that the Court never did, and that lower federal and state courts have consistently erred. Familiar principles (principles which, Justice Black recognized in his dissent in *Butts*, p. 13, *supra*, are reflected in the Seventh Amendment) counsel that the jury should keep the function of deciding facts, even in public figure libel cases. It is time for the Court finally to disenthrall lower federal and state appellate courts from their usurpation of the jury's function.

2. The Reviewing Court Below Invented a Definition of "Reckless Disregard of Truth or Falsity" that Would, if Followed, Require Public Figures to Prove Deliberate Falsity in Every Case.

A defamed public figure or public official may recover if the defendant published with "reckless disregard" of whether the story was false or not. *See New York Times*

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442 (9th Cir.),*cert. denied*, 419 U.S. 872 (1974). Following *Guam* in Alioto v. Cowles Communications, Inc., 519 F.2d 777, 780 (9th Cir. 1975), the Ninth Circuit held that

> an appellate judge on review, must examine the evidence to see whether, if all permissible inferences were drawn in the plaintiff's favor and all questions of credibility were resolved in his behalf, the evidence then would demonstrate by clear and convincing proof that the libelous material was published with actual malice. Once this question has been resolved in the plaintiff's favor, the jury's findings as to those inferences and as to witness credibility are determinative.

Thus there is at least confusion, if not direct conflict, among the federal courts on this issue, and the D.C., Fourth and Ninth Circuit decisions cited here conflict with the decision of the Kentucky court below. *See* Rule 17.1(b) of the rules of this Court.

Co. v. Sullivan, 376 U.S. at 280. As the Court has stated, "there is no constitutional value in false statements of fact. Neither the intentional lie *nor the careless error* materially advances society's interest in 'uninhibited, robust, and wide-open' debate on public issues." *Gertz v. Robert Welch, Inc.,* 418 U.S. at 340, quoting *New York Times,* 376 U.S. at 270 (emphasis added). The court below substituted "deliberate fabrication" for "reckless disregard." Its decision goes far beyond the place where this Court strikes the balance between reputation and debate.

The Court continues to impose liability in public figure libel cases under the actual malice standard,[11] including its "reckless disregard" component, "not only to compensate for injury but also to deter publication of unprotected material threatening injury to individual reputation." *Herbert v. Lando,* 441 U.S. 153, 172 (1979) (emphasis added). This maintains the precarious balance between "the important social values which underlie the law of defamation . . . . a pervasive and strong interest in preventing and redressing attacks upon reputation" on the one hand, and "the values nurtured by the First and Fourteenth Amendments," on the other. *Rosenblatt,* 383 U.S. at 86. To the present day, "this Court has sought to define the accommodation required to assure the vigorous debate on public issues that the First Amendment was designed to protect while at the same time affording protection to the reputa-

[11]Despite the vigorous effort by dissenting Justices to urge that all press criticism of public officials and public figures is absolutely privileged. *See New York Times,* 376 U.S. at 293 *et seq.* (concurring opinion of Black and Douglas, JJ.); *Garrison,* 379 U.S. at 79 *et seq.* (concurring opinion of Black and Douglas, JJ.); Rosenblatt v. Baer, 389 U.S. at 89 *et seq.* (concurring opinion of Black and Douglas, JJ.); *Curtis,* 388 U.S. at 170 *et seq.* (concurring and dissenting opinion of Black and Douglas, JJ.).

tions of individuals." *Hutchinson v. Proxmire,* 443 U.S. 111, 133-34 (1979).

The Court has defined "reckless disregard" variously as "a 'high degree of awareness of . . . probable falsity' ", *St. Amant, id.* at 731, quoting *Garrison v. Louisiana,* 379 U.S. at 74, and as whether "the defendant . . . entertained serious doubts as to the truth of his publication." *St. Amant, id.* Justice Harlan's plurality opinion in *Curtis Publishing Co. v. Butts,* 388 U.S. at 155, held that a public figure might recover "on a showing of highly unreasonable conduct constituting an extreme departure from the standards of investigation and reporting ordinarily adhered to by responsible publishers." These formulations strike the balance and "define the accommodation" between the two important interests of reputation and of free, robust and reponsible debate.

The trial court in this case correctly charged the jury on the *New York Times* standard in the very words of *St. Amant:* did the defendant "entertain[ ] serious doubts as to the truth of his publication," or did the defendant have a high degree of awareness of the probable falsity of the story. In reversing, the Kentucky Supreme Court substituted a different standard: "conduct which approaches the level of deliberate fabrication."[12] This so drastically tips the balance against the individual's interest in protecting his reputation that it requires prompt and vigorous correction by this Court. If approaching "deliberate fabrication" is to be the definition of reckless disregard of truth or

[12]The Kentucky court's formula not only conflicts with *St. Amant,* but with at least one federal court of appeals decision. In Orr v. Argus-Press Co., 586 F.2d 1108, 1116 (6th Cir. 1978), *cert. denied,* 440 U.S. 960 (1979), the court followed Justice Harlan's test of "extreme departure" from the standards of "responsible publishers."

falsity, then there is no longer a reckless disregard of truth or falsity test at all. All public figure libel plaintiffs would have to demonstrate conscious falsity, the deliberate lie; and *Curtis Publishing Co. v. Butts* would, in effect, be overruled.

Whatever may be included in the definition of "reckless disregard," approaching "deliberate fabrication" not only goes beyond the plain meaning of the standard but would effect a substantive change in the law. This Court's review is needed to correct that error.

3. The Evidence Presented to the Jury was Ample to Support a Verdict that Reckless Disregard of Truth or Falsity was Proven with Convincing Clarity.

The trial court, of course, properly instructed the jury in the *New York Times* standard of actual malice. He instructed the jury that reckless disregard could be found in a high degree of awareness by the newspaper of the probable falsity of the story, or if the newspaper's staff entertained "serious doubts as to the truth" of the story. P. 9 *supra*. In finding for plaintiff on this instruction, the jury necessarily accepted the testimony of the reporter who wrote the story, John Alexander, in his admissions of doubt and on the lack of urgency to publish.

The Kentucky Supreme Court was required, as it recognized, to draw "all permissible inferences in the plaintiff's favor and [resolve] all questions of credibility" in plaintiff's favor. App. 11a. It therefore had to accept Alexander's testimony as credible and resolve all inferences in plaintiff's favor.

When the Kentucky Supreme Court overturned the jury

verdict it violated this duty. If it accepted Alexander's credibility and drew all inferences in plaintiff's favor, it had to accept Alexander's testimony that there was no reason to publish the story in haste, that it was not "hot news." P. 5 *supra.* It did not. App. 16a. Indeed, even accepting the testimony of the newspaper's editorial staff, contrary to Alexander's, that the story had to run to beat Graves' press conference (despite their knowing that the story should not run without Graves being permitted to respond) and that they succumbed to a "stampede instinct," p. 6 *supra,* there was clear and convincing evidence of "highly unreasonable conduct" that is "an extreme departure from the standards of . . . responsible publishers." *Curtis Publishing Co.,* 388 U.S. at 155 (plurality opinion of Harlan, J.). The Court has never repudiated this definition of reckless disregard of truth or falsity, yet the Kentucky Court ignored it. Responsible publishers do not "stampede" in violation of a basic principle of journalism.

The Kentucky Supreme Court also was bound to accept Alexander's testimony, consistently repeated, of his "doubts" about the accuracy of his story, that he had "a great deal of trouble understanding the documents" — indeed that Alexander "was not completely sure that [he] had the complete information on anything," he "did not understand the entire arrangement" that was the subject of the story, and that the story should not have run because "it was wrong." Pp. 6-7 *supra.* Instead it seems to have accepted the contrary testimony of the paper's editors. App. 16a.

Finally, the Kentucky Supreme Court ignored its duty to draw in plaintiff's favor all inferences from the fact that two political enemies of Graves were the source of the story. App. 15a. This fact also supported the jury's verdict; it provided "reasons to doubt the veracity of the in-

formant or the accuracy of his reports." *St. Amant,* 390 U.S. at 732, quoted in *Herbert v. Lando,* 441 U.S. 153, 156-57 (1979).

4. The Reviewing Court's Substitution of its Own Verdict for the Jury's Deprived Petitioner of a Property Right in his Cause of Action and Jury Verdict, Without Due Process of Law and in Violation of the Fourteenth Amendment.

The lower court's substitution of its own verdict for the jury's, its repudiation of the jury's determinations of credibility and its failure to draw all inferences in plaintiff's favor, point 3 *supra,* violated its duty as an appellate court reviewing a jury verdict – a duty it recognized. App. 11a. By doing so the Kentucky court violated the principle that underlies the Seventh Amendment's admonition that "no fact tried by a jury shall be otherwise reexamined in any Court . . . than according to the rules of the common law." While the Seventh Amendment is not applicable to the States *per se,* this principle, which reflects the common law, is one of the bundle of procedural principles that make up due process of law.

A cause of action is "property" for Fourteenth Amendment due process purposes. *Cf. Logan v. Zimmerman Brush Co.,* 455 U.S. 422, 428-29 (1982), citing *Mullane v. Central Hanover Bank & Trust Co.,* 339 U.S. 306 (1950), and at n. 4, quoting *Martinez v. California,* 444 U.S. 277, 281-82 (1980); *see* the Brief for Petitioner in *Bose* at 61-62. *Cf.* also *Barr v. Preskitt,* 389 F.Supp. 496, 498 (M.D. Ala. 1975), and decisions of this Court there cited; *Reichenphader v. Allstate Ins. Co.,* 402 So.2d 311, 312 (La. App. 1981); *Hunter v. School District of Gale-Ettrick-Trempealeau,* 280 N.W.2d 313, 315 (Wis. App. 1979), *aff'd,* 293 N.W.2d 515, 519 (Wis. 1980).

The lower court's reversal of the jury verdict deprived petitioner of property without due process of law in violation of the Fourteenth Amendment.[13] While the Fourteenth Amendment does not require civil jury trials nor guarantee any particular form of state procedure, *Hardware Dealers' Mutual Fire Ins. Co. v. Glidden Co.*, 284 U.S. 151, 158 (1931), in deciding whether the due process clause has been violated, "regard must always be had to the character of the proceeding involved for the purpose of determining what the practice at common law was and what the practice in this country has been in like cases." *Crane v. Hahlo,* 258 U.S. 142, 147 (1922). Acceptance of a jury's determination of the facts (including, of course, its determinations of credibility),[14] unless the jury could not reasonably have reached the verdict rendered, is the ancient and continuing rule of the common law. At the minimum, this "requires that the jury be allowed to make reasonable inferences from facts proven in evidence having a reasonable tendency to sustain them." *Galloway v. United States,* 319 U.S. 372, 396 (1943). *See also Capital Traction Co. v. Hof,* 174 U.S. 1 (1899); *Randall v. Baltimore & Ohio R. Co.,* 109 U.S. 478 (1883).

When it repudiated the jury's inferences and credibility findings in its mistaken invocation of "*de novo* review," the Kentucky court violated Fourteenth Amendment due process. By doing so it deprived petitioner of his cause of

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[13]An analogous issue is before the Court in Bose v. Consumers Union of United States, No. 82-1246; Brief of Petitioner at 61-65.

[14]Determination of the credibility of witnesses by the trier of fact (here a jury in a jury trial) is an essential component of due process. *See* the Brief for Petitioner in *Bose* at 62-65, and cases there cited. When the Kentucky court below ignored a jury verdict that necessarily was based on credibility determinations, it violated this due process principle.

action for damages for libel, and of his jury verdict, in violation of the Fourteenth Amendment.

5. Protection of the First Amendment Rights of the Press Cannot Be Divorced from the Effect of False News Stories on the Electorate's First Amendment-Protected Right to an Effective, Unimpeded Vote.

The record here reflects the effect of the Herald-Leader's false story on Graves' campaign. P. 7 *supra*. To the extent that the falsehood demoralized Graves' supporters, impeded Graves' fund raising or influenced voters in favor of Graves' opponent, it influenced the election and its outcome. Protection of free speech, free press and untrammeled debate reaches its apogee in the election context. That indeed was the express basis for the strict actual malice standard announced in *New York Times Co. v. Sullivan. Id.*, 376 U.S. at 269-70, 273 n. 14, 280-82.

It is undeniable, however, that it is precisely in the election context that falsehood can be most damaging to the public's interests. The Court recognized in *Garrison v. Louisiana*, 379 U.S. at 75, that

> [a]t the time the First Amendment was adopted, as today, there were those unscrupulous enough and skillful enough to use the deliberate or reckless falsehood as an effective political tool to unseat the public servant or even topple an administration. That speech is used as a tool for political ends does not automatically bring it under the protective mantle of the Constitution.

(citation omitted).

The rights to vote, to an effective vote, and to associate to promote a political candidate or political objectives are

themselves protected by the First Amendment. *Williams v. Rhodes,* 393 U.S. 23, 30-31 (1968); and *see Storer v. Brown,* 415 U.S. 724, 729 (1974); *Kusper v. Pontikes,* 414 U.S. 51, 56-57 (1973). If a false news story affects an election, all voters' rights to an effective vote and to associate are abridged to some degree.[15]

The right to vote is fundamental, "because preservative of all rights." *Yick Wo v. Hopkins,* 118 U.S. 356, 370 (1886). If it is "undermined," other rights are "illusory." *Williams v. Rhodes,* 393 U.S. at 31. First Amendment protection of the press in libel cases, embodied in the actual malice standard, is not for the press' benefit. Its purpose is to promote free, robust political debate for the people's benefit, as *New York Times Co. v. Sullivan* makes plain. But where a false news story undermines the vote, even in slight degree, then countervailing First Amendment interests weigh against expansive interpretation of the malice standard to favor defendants – as in the Kentucky Court's proffer of a standard of "approach[ing] the level of deliberate fabrication." Indeed, they may weigh in favor of a stricter duty to check the accuracy of a story and the reliability of its sources than in other cases. And they may weigh most heavily against removing from the jury the determination whether reckless disregard of truth or falsity infected a false news story.

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[15]The Court has noted that "the rights of voters and the rights of candidates do not lend themselves to neat separation; laws that affect candidates always have at least some theoretical, correlative effect on voters." Bullock v. Carter, 405 U.S. 134, 143 (1972). If the word "actions" is substituted for "laws," the quotation applies here most aptly.

CONCLUSION

For the foregoing reasons the petition for a writ of certiorari should be granted and the judgment of the Kentucky Supreme Court reversed.

Respectfully submitted,

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APPENDIX A

SUPREME COURT OF KENTUCKY

81-SC-575-TG
82-SC-168-TG

THE LEXINGTON HERALD LEADER COMPANY — MOVANT/APPELLANT

V. APPEAL FROM FAYETTE CIRCUIT COURT
#78-CI-1608
HONORABLE CHARLES M. TACKETT, JUDGE

JOSEPH C. GRAVES — RESPONDENT/APPELLEE

AND

JOSEPH C. GRAVES — CROSS-APPELLANT

V. APPEAL FROM FAYETTE CIRCUIT COURT
#78-CI-1608
HONORABLE CHARLES M. TACKETT, JUDGE

THE LEXINGTON HERALD LEADER COMPANY — CROSS-APPELLEE

OPINION OF THE COURT
BY JUSTICE AKER

REVERSING

Joseph Graves, appellee, cross-appellant and plaintiff below, brought this defamation action in Fayette Circuit Court against The Lexington Herald Leader Company, appellant, cross-appellee, and defendant below, Knight-Ridder Newspapers, Inc. (the parent company of The Lexington Herald Leader Company) and Harold Collins,

editor of The Lexington Leader for an article concerning Graves which appeared in the July 21, 1977 edition of The Lexington Leader. Knight-Ridder Newspapers, Inc., was eventually dismissed as a party-defendant. Following extensive discovery, the remaining defendants moved for a summary judgment. That motion was denied and the matter came to trial. The jury found that the article in question contained false assertions of fact and that the false statements were defamatory. The jury further found that The Lexington Herald Leader Company (or its employees) published the article in question with "actual malice," but found that Howard Collins had not published the article with "actual malice." The jury awarded Graves damages in the amount of $100,000.00. The Lexington Herald Leader Company appealed the judgment and we granted transfer to this court from the Court of Appeals. We now reverse the judgment of the Fayette Circuit Court.

The question presented by this case is whether the Fayette Circuit Court, in determining there was sufficient evidence of record to submit a political candidate's defamation action to the jury, correctly interpreted and applied the rule of New York Times Co. v. Sullivan, 376 U.S. 254, that a plaintiff in such an action must prove that the defamatory publication "was made with 'actual malice' — that is, with knowledge that it was false or with reckless disregard of whether it was false or not." New York Times Co. v. Sullivan, 376 U.S., at 279-280.

Joseph C. Graves was a candidate for mayor of the Lexington-Fayette Urban County Government in 1977. Graves was successful in his bid to become one of the top two vote-getters in the May primary and along with James Amato was placed on the ballot for mayor in the November election. A state senator at the time of the election,

Graves had been in public office since 1967, serving as city commissioner, state representative, as well as state senator.

Graves had made it a policy for much of his public life to file in the miscellaneous books of the Fayette County Court documents identified as financial statements and tax returns. The filing of these financial statements was a purely voluntary measure and was not required by any governmental agency. Such filings were designed to inform the public, particularly Graves' constitutents, of the extent of his personal finances, as well as to facilitate the acquisition of credit. The subject of Graves' and his family's property holdings, especially in downtown Lexington, and the potential for conflict of interest in the past had been, and was anticipated by his campaign staff to be, a matter of public controversy. Thus, in order to defuse the impact of the issue should it arise during the mayoral campaign, Graves, after announcing his candidacy for mayor, filed on January 31, 1977, documents identified as "Joe Graves' Balance Sheet." After filing this financial data, Graves authorized his campaign press secretary to forward a copy of these documents to The Lexington Herald Leader Company, which publishes two newspapers, The Lexington Herald and The Lexington Leader, with combined editions on Saturday and Sunday.

At some point before the May primary, two Lexington attorneys, Robert Miller and Timothy Green, plotted to furnish certain letters, deeds and other documents concerning the nature and extent of Graves' family property holdings, and alleged controversies and possible conflicts of interest involving Graves, to a reporter of The Lexington Herald Leader Company. Whatever their motivations, it was Green and Miller's intent that these docu-

ments lead to a story, or series of stories, unfavorable to Graves.

The reporter selected as the recipient of Green's and Miller's information was John Alexander. John Alexander had been employed by The Lexington Herald Leader Company for some seventeen years, during which time he had served in a number of reporting and sub-editorial functions, occasionally reporting on court and courthouse stories.

Following an anonymous phone call to Alexander, Green, revealing his identity, met with Alexander, and provided him with various documents pertaining to Graves. The materials, described by Alexander as a "complicated hodgepodge," included various deeds, newspaper clippings, letters, growth plans of certain banks, and other documents. In analyzing the documents and preparing his story Alexander, from time to time, received assistance from Green.

Some time later, Miller would concoct a "story" of his own, incorporating the various documents of the "Graves file," and including an imaginary interview with Graves. However, there is no evidence to indicate Alexander ever saw a copy of Miller's story, despite some superficial similarities between the story and the article written by Alexander. Assuming Alexander was privy to Miller's story, such evidence would indicate that Alexander's interpretation of the information may have been influenced by Miller's treatment.

Apparently some time after the May primary, the Graves story was brought to the attention of the editorial staff of the Lexington Herald Leader Company. At that time, Alexander spoke with Harold Collins, editor of The

Lexington Leader, concerning the information Alexander had received. Although the sources of the information were not revealed to Collins, he did authorize Alexander to continue investigation of the matter of Graves' property holdings.

After his meeting with Collins, Alexander prepared a list of questions regarding the documents and information he had gathered during his investigation. Alexander presented the list to Graves on June 28, 1977. A meeting between Alexander, Collins and Graves to discuss the questions was scheduled for the following day.

However, Graves cancelled the meeting. Viewing The Lexington Herald Leader Company's coverage of the primary campaign as unfair, and suspecting that the newspaper company would be an ally of his opponent, Mr. Amato, Graves, upon review of the questions, became suspicious of the newspaper's intentions. Graves felt that the questions were "unprofessional" and accusatory in nature and that more time would be required to prepare his response.

As a consequence of having cancelled the meeting, Graves proposed, in a leter dated July 5, 1977, that Alexander and Collins attend a previously scheduled news conference on Friday, July 22, at which time Graves indicated he would address those areas of concern to the newspaper. In addition, Graves noted that he would be on vacation the week preceding the news conference, and stated, "I assume you are not in a rush for my answers since John [Alexander] told me he has had this list since before the primary."

Following receipt of the letter, Alexander was instructed to prepare a story, which was completed sometime be-

tween the 12th and 15th of July and submitted to Collins on July 15, the day Collins was to leave on vacation. Prior to his departure, however, Collins read the submitted article, made some editing changes at that time, after which he turned the article over to Rich Schwein, city editor of The Lexington Leader. Collins testified that he instructed Schwein to edit the story carefully and to continue attempts to arrange a meeting between Graves and representatives of the newspaper. Collins vacationed in South Carolina and did not return until after the story was published.

Likewise, Alexander went on vacation on July 15. Before leaving the office that day, Alexander left a note with assistant city editor, Bette Pierce, noting that Graves was on vacation and could not be reached, and stating, "Don't know where we are right now."

At this point, it is necessary to go into some detail regarding the testimony concerning the actions of Alexander. The story which is the subject matter of this libel action appeared in The Lexington Leader on Thursday, July 21. Both Collins and Graves were vacationing during the week preceding the publication. Collins would not return until after the story was published. Alexander was on vacation as well, but continued in his attempts to contact Graves and kept in touch with the newspaper.

According to Rich Schwein, in the days preceeding [sic] July 21, Alexander was in the newsroom strongly urging that his story run before the July 22 news conference. Alexander denies that he was concerned about the story, stating that he did not consider the story "hot news." Regardless, Alexander continued to try and contact Graves for his comments. On Wednesday, July 20, the day

before the story appeared in the paper, Alexander went to Graves' home and tried "every way I knew to find him." Ultimately, Alexander went to Graves' campaign headquarters and informed Graves' campaign manager that the story was going to run, and that without a response from Graves, the story would probably crucify him.

On the same day, Wednesday, July 20, Robert Fain, the editor in charge of the Lexington Leader in Collins' absence, became involved in the decision of whether to run the story prior to Friday's news conference. Fain recalls Alexander coming to the newsroom and urging him to run the story so that Alexander could have an exclusive. Alexander denies that he was pressing the editor to publish the article, stating he did not care whether it was published.

Alexander testified he was unconcerned about publishing prior to the news conference because, having researched the issue and knowing the questions to ask, he would still have an advantage over other journalists. In addition, Alexander stated he had doubts concerning the completeness of the story when he turned it in to Collins. He was not sure the story was pertinent nor completely accurate, as the legal documents involved were complicated and he had been unable to discuss the matter with Graves. However, he did assume that prior to publication the story would be examined, and corrected if necessary, by attorneys of the newspaper.

There is no evidence that Alexander expressed the doubts he claimed to have had concerning the article to any of the editors of The Lexington Leader prior to its publication, nor did he make any effort to ensure a prepublication examination by attorneys – assuming such a

check perfunctory for stories of this type.[1]

On Thursday, July 21, the subject article, entitled "Graves Property List Apparently Inaccurate," appeared in the local edition of The Lexington Leader. Without going into detail, it would be fair to say that the basic thrust of the story was that Graves, in his financial statement, had under-represented his interests in certain pieces of property. The article further suggested the appearance of impropriety regarding Graves' property interest in light of his position as a public officeholder. As was later revealed, the figures purporting to reflect Graves' interest in certain downtown Lexington property were incorrect and the article was substantially false.

The day the story ran, Alexander picked up a copy of the paper and upon reading the article immediately noticed an error involving the substitution of the word "unless" for the word "if." Alexander then contacted Fain at The Leader and asked him to "blur the plates . . . on the remainder of the press run" so as to obliviate the error. He did not note any errors regarding the numerical figures representing Graves' property interest.

On the following day, Friday the 22nd, Graves held his press conference. In preparation, the Graves campaign staff had compiled a substantial packet of printed material for distribution. One of the items attacked The Leader article, pointing out various inaccuracies and misleading statements. In addition, an addendum to Graves' financial

[1]Alexander further testified that prior to submitting the article to Collins, he noticed inaccuracies in his story as originally typed (inaccuracies relating to Graves' percent of ownership in certain properties) and that he made handwritten corrections. The corrections reflected the true state of Graves' ownership.

statement was distributed, correcting errors and omissions discovered in Graves' earlier financial disclosures. The Lexington Herald Leader Company reported the news conference, noting the Graves' campaign reaction to the July 21 Leader article, in stories appearing July 22 and 23.

In the wake of the furor created by the Alexander article, the staff of The Lexington Herald Leader Company began a series of meetings aimed at ascertaining Graves' actual interest in the various properties. Creed Black, publisher of The Lexington Herald Leader Company, testified that as a result of these meetings it became his opinion that Alexander did not understand the various transactions involving the Graves' property nor could he adequately explain Graves' percentage ownership therein. Consequently, Black instructed Herald Leader attorneys to examine the sundry documents and ascertain the extent of Graves' property holdings.

After a title examination by the attorneys, followed by conferences with Black, Collins and Alexander, the actual extent of Graves' property holding was ascertained. On August 5, 1977, The Lexington Leader published an article entitled "Graves Property Story Wrong," incorporating the attorneys' findings regarding the errors in Alexander's story.

As a result of their investigation, Collins and Black concluded that the editors involved had improperly edited the story and that Alexander was guilty of "gross incompetence and negligence" in his preparation of the story. Collins then took the following actions: Schwein, the city editor and Alexander's direct supervisor, was demoted; Bette Pierce, the assistant city editor, was also demoted; Alexander was dismissed.

I

For the purposes of this case we accept the determination of the Fayette Circuit Court that the subject article was false and defamatory, and that Graves was a public figure and therefore had the burden of proving the false statements were published with actual malice as defined in New York Times Co. v. Sullivan, and later cases. We do not, however, agree with the Fayette Circuit Court that Graves sustained this burden.

As stated above, the single issue raised by the appellant is whether the evidence in the record is sufficient to support the jury's finding that the article was published with actual malice, as defined in New York Times Co. v. Sullivan. In reviewing this question, this court's duty is not limited to elaboration and reaffirmation of constitutional principles; we are also required to review the evidence and make certain such principles have been constitutionally applied. The United States Supreme Court has made it quite clear that it is our role, as an appellate court in cases such as this, to "examine for ourselves the statements in issue and the circumstances under which they were made to see . . . whether they are of a character which the principles of the First Amendment, as adopted by the Due Process Clause of the Fourteenth Amendment, protect." Pennekamp v. Florida, 328 U.S. 331, *as quoted in* New York Times Co. v. Sullivan, 376 U.S. at 285. We are required to "make an independent examination of the whole record, . . . so as to assure ourselves that the judgment does not constitute a forbidden intrusion on the field of free expression." Id. Clearly then, this court must test this challenged judgment against the guarantees of the First and Fourteenth Amendments, and in doing so, cannot

avoid making an independent constitutional judgment on the facts of this case.

Simply put, whether the subject article was published with actual malice is a question of "constitutional fact"; First Amendment questions of "constitutional fact" compel *de novo* review. Rosembloom v. Metromedia, Inc., 403 U.S. 29, 54 (1971); Beckley Newspapers Corp. v. Hanks, 389 U.S. 81, 82 (1967); New York Times v. Sullivan, 376 U.S., at 285. However, this does not mean that the jury's verdict is entitled to no weight. An appellate court on review, or for that matter a trial court on motion for judgment n.o.v., must examine the entire record, drawing all permissible inferences in the plaintiff's favor and resolving all questions of credibility in his behalf, and determine whether the evidence would then demonstrate by clear and convincing proof that the defamatory statement was published with actual malice. *See* Alioto v. Cowles Communications, Inc., 519 F.2d 777 (9th Cir. 1975); Guam Federation of Teachers, Local 1581, A.F.T. v. Ysrael, 492 F2d 438, 439 (9th Cir. 1974); Cape Publications, Inc. v. Adams. Fla. App., 336 So. 2d 1197, 1199 (1976). Our examination of the entire record, in the manner stated above, satisfies us that "the proof presented to show actual malice lacks the convincing clarity which the constitutional standard demands." New York Times Co. v. Sullivan, 376 U.S., at 285-286.

II

Graves, seeking to vindicate his reputation, would have us affirm the judgment for damages awarded on his claim of libel. The Lexington Herald Leader Company, seeking to protect its right to publish, would have us reverse the

judgment on the grounds that there was an absence of clear and convincing evidence of actual malice.

The case before us reflects a conflict between competing claims and rights. The United States Supreme Court, in the New York Times case and its progeny, has established the principle that where the reputational interests of a public figure conflict with the constitutional command of free speech and free press, the constitutional right must predominate. Noting that erroneous statement is inevitable in free debate, the Supreme Court has decided that some false statements must be protected if the freedoms of expression are to have the breathing space necessary for their survival. Garrison v. Louisiana, 379 U.S. 64, 85 (1964). In order to distinguish between defamatory speech which has no redeeming social value from protected criticism of public figures, the Supreme Court established the dividing line of "actual malice."

Under the rule of New York Times Co. v. Sullivan, "actual malice" is defined as "knowledge that [the statement] was false or . . . reckless disregard of whether it was false or not." New York Times v. Sullivan, 376 U.S., at 280. Inasmuch as there is no evidence to suggest that The Lexington Herald Leader Company or any of its employees knew the article contained false statements, we will restrict ourselves to the question of whether the actions of The Lexington Herald Leader Company or any of its employees[2] amounted to "reckless disregard."

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[2]Knowledge of falsity or reckless disregard may be imputed to publishers under the traditional doctrine of respondeat superior. The United States Supreme Court has made it clear that publishers can be held vicariously liable for knowing or reckless falsehoods of free lance writers, stringer correspondents, as well as reporters. Cantrell v. Forest City Publishing Co., 419 U.S. 245, 253-254 (1974).

"[R]eckless disregard is not measured by whether a reasonably prudent man would have published, or would have investigated before publishing." St. Amant v. Thompson, 390 U.S. 727, 721 (1968). Reckless disregard is something much more than gross negligence; reckless disregard must reflect a conscious awareness of probable falsity. Curtis Publishing Co. v. Butts, 388 U.S. 130 (1967); Beckley Newspaper Corp. v. Hanks, 389 U.S. 81 (1967); St. Amant v. Thompson, 390 U.S. 727 (1968). The record must be examined to determine whether there is "sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication." St. Amant v. Thompson, 390 U.S., at 731 (1968). In other words, there must be a showing that the false publication was made with a "high degree of awareness of probable falsity." Garrison v. Louisiana, 379 U.S., at 74.

For guidance, the court in *St. Amant* offered this catalogue of circumstances which might show actual malice:

> The defendant in a defamation action brought by a public official cannot, however, automatically insure a favorable verdict by testifying that he published with a belief that the statements were true. The finder of fact must determine whether the publication was indeed made in good faith. Professions of good faith will be unlikely to prove persuasive, for example where a story is fabricated by the defendant, is the product of his imagination, or is based wholly on an unverified anonymous telephone call. Nor will they be likely to prevail when the publisher's allegations are so inherently improbable that only a reckless man would have put them in circulation. Likewise, recklessness may be found where there are ob-

> vious reasons to doubt the informant or the accuracy of his reports. St. Amant v. Thompson, 390 U.S. at 732 (footnote omitted).

It is obvious from this litany of "reckless" conduct that liability may rest only on conduct which approaches the level of deliberate fabrication – the defendant must entertain serious doubts (i.e. be consciously aware of his allegations' probable falsity), and publish despite those serious doubts.

Graves would have us believe that this case is unique among the overwhelming majority of reported cases on this subject because Alexander, the author of the false statements, freely admitted his doubts about the accuracy of his story. A review of the evidence reveals that the doubts to which Graves refers are not doubts as to the accuracy of Alexander's analysis and interpretation of the documents from which the story was derived, rather, Alexander's doubts stemmed from his inability to discuss the matter with Graves. There is nothing in Alexander's testimony to indicate that he possessed a "high degree of awareness of [the] probable falsity" of his article. Instead, Alexander's concerns related solely to the absence in the article of any comment by Graves. Concerns such as these do not amount to "serious doubts as to the truth of his publication."

Graves also urges there is additional evidence, aside from Alexander's own testimony, to indicate Alexander possessed the "conscious awareness of probable falsity" demanded by the constitution. Graves stresses Black's and Green's testimony that in their opinion Alexander did not understand the deeds and documents upon which the story was based, the inference being that if Black and Green felt Alexander did not comprehend the deeds and documents,

then Alexander himself must have known that he did not comprehend, and therefore had a high degree of awareness of the article's probable falsity.

This evidence, and the inference suggested, does not amount to clear and convincing evidence of reckless disregard. The argument proves too much. That Alexander did not understand the true import of the documents is adequately demonstrated by the fact that he wrote the article as he did; had he comprehended their meaning he would not have written the article in the form in which it appeared. Black's and Green's testimony adds nothing to what is patently apparent — Alexander did not understand the documents. To endorse Graves' argument would be tantamount to allowing the false statements themselves to prove reckless disregard: false statements prove lack of understanding; lack of understanding indicates self-awareness of this inability; self-awareness indicates serious doubts. Liability rests only on clear and convincing evidence of conscious awareness of a high probability of falsity. Closer to the mark regarding Alexander's state of mind is Black's testimony that Alexander believed what he wrote was accurate and that he "was defending this story just as vigorously as he could."

Graves also argues that evidence of the "Green-Miller conspiracy" shows Alexander's reckless disregard. Graves contends that since Green and Miller provided Alexander the information and the research, and assisted in interpretation, and because they were political enemies of Graves, Alexander must have had serious doubts as to the accuracy of his story. Once again, this evidence lacks the convincing clarity which the constitutional standard requires.

The statements were not "so inherently improbable that only a reckless man would have put them in circulation." St. Amant v. Thompson, 390 U.S., at 732. Nor was the fact that Green and Miller were Grave's political enemies sufficient to constitute an obvious reason to doubt their truthfulness. There is no evidence of Green's and Miller's reputation for veracity, no evidence of a low community assessment of their trustworthiness, and no evidence that they had given Alexander inaccurate information in the past. Furthermore, this is not a case where the informant's report is the sole basis of the false statements; Alexander examined the documents, and on the basis of his interpretation of those documents (albeit assisted by Green and Miller) he wrote the article. Alexander's independent analysis, to whatever degree, diminished the importance of Alexander's opinion regarding Green's and Miller's trustworthiness, of which, as stated above, there is little or no evidence.

Graves also argues that since the story was not, in Alexander's opinion, "hot news," it was incumbent on The Lexigton Herald Leader Company to postpone publication until after Graves' press conference. Despite Alexander's opinion regarding the urgency of publication, the "hot news" justification for failing to investigate further cannot be dismissed as easily as Graves would have us believe. The timing of the publication was the editor's decision, and in the minds of the editors the story was "hot news," or at least became so as the Graves press conference approached. As the Leader editors testified, their reluctance to publish without Graves' comment was overcome as they were "stampeded into publishing it in an effort to get a scoop."

There is simply insufficient evidence in the record to prove that the Lexington Herald Leader Company, or any of its employees published ". . . the story with the kind of reckless 'I-don't-care-about-the-truth' state of mind that would meet the requirement of scienter under the subjective malice standard." Orr v. Argus-Press Co., 586 F2d 1108 (1978).

III

Under the constitutional standard which we are required to apply, liability for defamation does not rest on the degree of deviation from responsible journalism, but rather focuses on the state of mind of the defendant. As the United States Supreme Court has noted, it may be said the "test puts a premium on ignorance, [and] encourages the irresponsible publisher not to inquire . . ."; and as this case aptly demonstrates, "the reckless disregard standard may permit recovery in fewer situations than would a rule that publishers must satisfy the standard of the reasonable man or the prudent publisher." St. Amant v. Thompson, 390 U.S. at 371.

Nonetheless, the United States Supreme Court has determined that such a standard is necessary in order to preserve the vitality of the constitutional freedoms of expression. Self-government rests on a bedrock of information freely received and freely given. The stake of a vital democratic society and its people in the public business, and in the conduct of public officials and candidates for such offices, "is so great that neither the defense of truth nor the standard of ordinary care would protect against self-censorship, and thus adequately implement First Amendment policies." St. Amant v. Thompson, 390 U.S. at 371-372.

The First Amendment is not served by lies or false statements, and we do not condone negligent or second-rate reporting. But to ensure the publication of the truth about public affairs, some erroneous publications must be protected as well.[3]

A press which is protected by a burden of proof requiring clear and convincing evidence of actual malice should adopt and maintain standards which warrant this unique constitutional privilege. The press must be responsible and conscientious, and as sensitive to the importance of accurate reporting as are those about whom they report.

However, the evidence in this case will not allow us to affirm this judgment and remain consistent with the principles of the First Amendment.

Therefore, the judgment of the Fayette Circuit Court is reversed, and this case remanded for entry of judgment consistent with this opinion.

Stephens, C.J., and Aker, Clayton, Palmore, and Sternberg, J.J., concur. O'Hara and Stephenson, J.J., dissent.

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[3]As Justice Jackson poignantly observed," . . . the price of freedom of religion or of speech or of the press is that we must put up with, and even pay for, a good deal of rubbish." U.S. v. Ballard, 322 U.S. 78, 95 (1944) (Jackson, J., dissenting).

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SUPREME COURT OF KENTUCKY

81-SC-575-TG
82-SC-168-TG

THE LEXINGTON HERALD LEADER COMPANY — MOVANT/APPELLANT

V. APPEAL FROM FAYETTE CIRCUIT COURT
#78-CI-1608
HONORABLE CHARLES M. TACKETT, JUDGE

JOSEPH C. GRAVES — RESPONDENT/APPELLEE

AND

JOSEPH C. GRAVES — CROSS-APPELLANT

V. APPEAL FROM FAYETTE CIRCUIT COURT
#78-CI-1608
HONORABLE CHARLES M. TACKETT, JUDGE

THE LEXINGTON HERALD LEADER COMPANY — CROSS-APPELLEE

DISSENTING OPINION BY JUSTICE STEPHENSON

The majority opinion correctly states the facts in this case and cites the controlling case law as pronounced by

the United States Supreme Court. It is in the application of the principles of law to the facts here that I differ with the majority.

In reviewing the cases cited in the majority opinion, I was particularly struck by the analogy between the facts here and those in Curtis Publishing Co. v. Butts, 388 U.S. 130, 18 L.Ed.2d 1094 (1967).

Curtis involved a law suit by Wally Butts, football coach at the University of Georgia against Curtis Publishing Company for an article published in its *Saturday Evening Post* which accused Butts of conspiring to "fix" a football game between the University of Georgia and the University of Alabama. This article was based on allegations of an individual who inadvertently overheard a telephone conversation between Butts and Paul Bryant, coach of the University of Alabama football team. The article portrayed the conversation as Butts' revealing to Bryant all the secrets of the Georgia football team, including offensive plays etc., then proceeded to discuss the game and that the players and others on the sidelines were aware of Alabama's being privy to Georgia's secrets. In deciding the evidence was sufficient to sustain the verdict the court observed at page 1112:

> "The evidence showed that the Butts story was in no sense 'hot news' and the editors of the magazine recognized the need for a thorough investigation of the serious charges. Elementary precautions were, nevertheless, ignored. The Saturday Evening Post knew that Burnett had been placed on probation in connection with bad check charges, but proceeded to publish the story on the basis of his affidavit without substantial independent support. Burnett's notes were not even viewed by any of the magazine's personnel

prior to publication. John Carmichael who was supposed to have been with Burnett when the phone call was overheard was not interviewed. No attempt was made to screen the films of the game to see if Burnett's information was accurate, and no attempt was made to find out whether Alabama had adjusted its plans after the alleged divulgence of information.

"The Post writer assigned to the story was not a football expert and no attempt was made to check the story with someone knowledgeable in the sport. At trial such experts indicated that the information in the Burnett notes was either such that it would be evident to any opposing coach from game films regularly exchanged or valueless. Those assisting the Post writer in his investigation were already deeply involved in another libel action, based on a different article, brought against Curtis Publishing Co. by the Alabama coach and unlikely to be the source of a complete and objective investigation. The Saturday Evening Post was anxious to change its image by instituting a policy of 'sophisticated muckraking,' and the pressure to produce a successful exposé might have induced a stretching of standards. *In short, the evidence is ample to support a finding of highly unreasonable conduct constituting an extreme departure from the standards of investigation and reporting ordinarily adhered to by responsible publishers."* (Emphasis added.)

The keystone of the majority opinion is that part which excuses the failure to investigate further on the premise that in the minds of the editors the story was "hot news." By any standard in any of the cases, the story here was not "hot news." Associated Press v. Walker consolidated with *Curtis Publishing Co.* exemplifies a "hot news" situation.

There an incident was reported, which "required immediate dissemination. . . . from a correspondent who was present at the scene of the events . . . . Considering the necessity for rapid dissemination, nothing in this series of events gives the slightest hint of a severe departure from accepted publishing standards."

To paraphrase Curtis Publishing Co., the evidence here shows that the Graves story was in no sense "hot news"; and the editors of the newspaper should have recognized the need for a thorough investigation of the serious charges.

Alexander was not an expert on analyzing property interests from deeds, property transactions, etc. and made no attempt to check his story for accuracy with the newspaper's lawyers who made an analysis of the deeds etc. after the story was published and determined the article was wrong. Alexander testified he was not sure the story was pertinent or completely accurate.

With the removal of the "hot news" finding which cannot be sustained upon this set of facts, the logic and reasoning of the majority opinion collapses. There is no reasonable manner in the absence of "hot news" that the failure to investigate a technical matter beyond the limitations of Alexander can be executed [sic] as a matter of law. Here, as in *Curtis Publishing Co.*, we have a jury issue. The trial court properly submitted this issue of "reckless disregard" to the jury, and we should not disturb the jury verdict. The jury made a finding of actual malice. This verdict of the jury is consistent with the "reckless disregard" standard upon which actual malice can be based. While paying lip service to the "reckless disregard" standard laid down in *New York Times Co. v. Sullivan, Gar-*

rison v. Louisiana, St. Amant v. Thompson and *Curtis Publishing Co. v. Butts,* the majority opinion suggests that there is nothing in Alexander's testimony to indicate he possessed a high degree of awareness of the probable falsity of his article. Surely this is a jury issue and the majority acts as a jury in deciding this question adversely to Graves. The jury could consider the evidence that Alexander had told Graves' campaign manager that the story would crucify Graves. The jury should be allowed to draw an inference from this statement as a "high degree of awareness" taken together with an absolute failure to investigate complicated legal questions beyond the capability of Alexander to verify.

This holding goes beyond the "reckless disregard" standard of the United States Supreme Court; and if absolute proof of "high degree of awareness" is to be required, I fail to see how a citizen could ever make out a jury case on this question.

I am of the opinion that the evidence presented here with all the permissible inferences is sufficient to support a jury verdict, particularly in view of the analogous factual situation presented in *Curtis Publishing Co.*

When all the exercises in semantics, "reckless disregard of falsity," "more than gross negligence" (although the two terms seem the same to me), "high degree of awareness of probable falsity," used to impute actual malice are stripped away and the problem is reduced to its essentials, we have the review of an appellate court in which we determine upon a state of facts if the constitutional command of free speech and free press should give way to the right of a citizen, even though a public figure, to the protection of his reputation.

It seems to me the jury had sufficient evidence to determine that a "reckless disregard" had been demonstrated by the newspaper. I would affirm the judgment of the trial court. Accordingly I dissent.

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SUPREME COURT OF KENTUCKY

81-SC-575-TG
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HONORABLE CHARLES M. TACKETT, JUDGE

THE LEXINGTON HERALD LEADER COMPANY — CROSS-APPELLEE

DISSENTING OPINION BY JUSTICE O'HARA

I am in partial agreement with the dissent, but in my opinion the most grievous error of the majority is in its erroneous assessment of the evidence.

Without recounting the proof in detail, suffice it to say that the evidence in this case was amply sufficient to have warranted the fact-finder, properly instructed, to have found "reckless disregard". To hold otherwise is to preempt the appropriate function of the jury in this case.

I, therefore, dissent.

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APPENDIX B

SUPREME COURT OF KENTUCKY

81-SC-575-TG
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THE LEXINGTON HERALD LEADER COMPANY — CROSS-APPELLEE

ORDER DENYING PETITION FOR REHEARING

The petition for rehearing of Joseph C. Graves is denied.

The opinion in this case, rendered December 28, 1982, is ordered not to be published.

Stephens, C.J., Aker, Vance and Wintersheimer, JJ., concur. Gant, Leibson and Stephenson, JJ., would grant the petition.

ENTERED June 15, 1983.

/s/ Robert F. Stephenson
Chief Justice

APPENDIX C

FAYETTE CIRCUIT COURT
CIVIL BRANCH
FIFTH DIVISION

JOSEPH GRAVES — PLAINTIFF

VS. INSTRUCTIONS TO THE JURY NO. 78-CI-1608

THE LEXINGTON HERALD-LEADER COMPANY, ET AL. — DEFENDANTS

• • • • •

INSTRUCTION NO. 1

Do you believe from the evidence that all of the statements of fact contained in the article published by the Lexington Herald Leader Company on July 21, 1977, concerning the plaintiff, Joe Graves, were substantially true?

Yes _____ No 12

/s/ Nancy Refbord forewoman _____ _____

_____ _____ _____

_____ _____ _____

If 9 or more of the jury has signed this Instruction No. 1 "Yes", then you do not need to proceed. You will have found for the defendants.

If 9 or more have signed this Instruction No. 1 "No", then answer Instruction No. 2.

INSTRUCTION NO. 2

Do you believe from the evidence that the publication of those statement(s) of fact which you believe were false,

held the plaintiff up to public hatred, contempt, or scorn, or tend to degrade or disgrace him in the community?

Yes 12 No _____

/s/ Nancy Refbord forewoman _____ _____

_____ _____ _____

_____ _____ _____

If 9 or more of the jury answered "No" to this Instruction No. 2, then you do not need to proceed any further. You have found for the defendants. If 9 or more answered "Yes" to this Instruction No. 2 and your number includes at least 9 of those jurors who signed "No" to Instruction No. 1, then answer Instruction No. 3.

INSTRUCTION NO. 3

Do you believe from the evidence that The Lexington Herald Leader Company, or any of its employees, published the July 21, 1977 article, which contained false statement(s) of fact about Joe Graves, with "actual malice"?

"Actual Malice" means that the false statement(s) of fact were published with The Lexington Herald-Leader Company, or any of its employees, knowing that they were false, or with reckless disregard of whether they were true or not.

"Reckless disregard" means that The Lexington Herald Leader Company, or any of its employees, had a high degree of awareness of the probable falsity of the statements

published, or in fact entertained serious doubts as to the truth of said statements which were published on July 21, 1977.

Yes 9 No 3

/s/ Nancy Refbord	/s/ Melinda Jones	/s/ Wm. L. Esenbock
/s/ Marie Merand	/s/ Wilma V. Ratliff	
/s/ Jane M. Emanue	/s/ Gerald S. Greene	
/s/ Khristine H Cole	/s/ Robert W. Withall Jr.	

If 9 or more of the jury answer "No" to this Instruction No. 3, then you do not need to proceed any further.

If 9 or more answer "Yes" to this Instruction No. 3, and your number includes at least 9 of those jurors who signed "No" to Instruction No. 1, and "Yes" to Instruction No. 2, then you will have found for the plaintiff against the Herald Leader Company, and you shall proceed to Instruction No. 4 and to Instruction No. 5.

INSTRUCTION NO. 4

If you answered Instruction No. 3 "Yes", do you believe that Howard Collins, who is an employee of the Herald Leader Company published the July 21, 1977 article, which contained false statement(s) of fact about Joe Graves, with "actual malice"?

"Actual malice means that the false statement(s) of fact were published with Howard Collins knowing that they were false, or with reckless disregard of whether they were true or not.

"Reckless disregard" means that Howard Collins had a high degree of awareness of the probable falsity of the

statements published, or in fact entertained serious doubts as to the truth of said statements which were published on July 21, 1977.

Yes _____ No 9

/s/ Nancy Refbord	/s/ Melinda Jones	/s/ Wm. L. Esenbock
/s/ Marie Merand	/s/ Wilma V. Ratliff	
/s/ Jane M. Emanuel	/s/ Gerald S. Greene	
/s/ Khristine H Cole	/s/ Robert W. Withall Jr.	

If 9 or more of the jury answer "No" or "Yes" to this instruction, your number must include at least 9 of those jurors who signed "No" to Instruction No. 1, "Yes" to Instruction No. 2, and "Yes" to Instruction No. 3.

If 9 or more of you answered "No", you will have found for Howard Collins. If 9 or more of you answered "Yes", you will have found for Mr. Graves against Mr. Collins. Regardless of how you answer this instruction, if you answered Instruction No. 3 "Yes", then proceed to Instruction No. 5.

INSTRUCTION NO. 5

If your answers to Instruction No. 1 were "No", to Instruction No. 2 were "Yes", and to Instruction No. 3 were "Yes", you shall award to the plaintiff, Joe Graves, and against the defendant, The Lexington Herald Leader, such sum in damages as you might believe from the evidence will fairly and reasonably compensate the plaintiff for mental anguish or suffering, personal humiliation and loss or injury to his character, reputation and standing in the community, if any, caused by the article published on July

21, 1977 by the defendants, not to exceed the amount claimed, $300,000.

If you answered "Yes" to Instruction No. 4, then any award which you might make for Mr. Graves against The Lexington Herald Leader will also be made against Mr. Howard Collins.

$100,000.00

/s/ Nancy Refbord	/s/ Melinda Jones	/s/ Wm. L. Esenbock
/s/ Marie Merand	/s/ Wilma V. Ratliff	
/s/ Jane M. Emanuel	/s/ Gerald S. Greene	
/s/ Khristine H Cole	/s/ Robert W. Withall Jr.	

Your number must include at least 9 of those jurors who signed "No" to Instruction No. 1, "Yes" to Instruction No. 2, and "Yes" to Instruction No. 3, and "Yes" or "No" to Instruction No. 4.

INSTRUCTION NO. 6

Nine, ten, eleven or twelve of you may make a verdict. If all twelve make a verdict only the foreman need sign the verdict. If nine, ten, or eleven of you make a verdict, then all those making the verdict must sign the verdict.

No. 83-619

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

JOSEPH C. GRAVES,

Petitioner,

v.

THE LEXINGTON HERALD-LEADER COMPANY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF KENTUCKY

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Kentucky Supreme Court, in accordance with nearly two decades of decisions from this Court, correctly reversed the libel judgment in favor of a public official/public figure plaintiff against a media defendant after an independent examination of the record.

2. Whether the Kentucky Supreme Court correctly reversed the judgment where the plaintiff, a public official and a public figure, failed to show that the article in question was published with a reckless disregard for the truth.

In accordance with Supreme Court Rule 28.1, please be advised that Knight-Ridder Newspapers, Inc. is the parent company of the Respondent, The Lexington Herald-Leader Company. Knight-Ridder Newspapers, Inc. was named as a defendant in the Complaint, but was dismissed as a party defendant prior to trial. Howard Collins, editor of The Lexington Leader at the time the article in question was published, was a defendant at trial below, but the jury found no liability against him. Neither the reinstatement of Knight-Ridder Newspapers, Inc. as a party nor the issue of Howard Collins' liability was raised on appeal before the Kentucky Supreme Court, or in the Petition for Certiorari.

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IN THE

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RESPONDENT'S BRIEF IN OPPOSITION

OPINION BELOW

The opinion of the Supreme Court of Kentucky, issued December 28, 1982, is set forth in the Appendix filed by Petitioner at pages 1a through 25a. The Order of the Supreme Court of Kentucky, denying Joseph C. Graves' petition for rehearing, is set forth in the Appendix at page 26a.

COUNTERSTATEMENT OF THE CASE

This case is a defamation action brought against The

Lexington Herald-Leader Company for the July 21, 1977 publication of an article in The Lexington Leader, an afternoon Newspaper then published by the Respondent in Lexington, Kentucky.[1] While this action revolves around only one article, the determinative facts in this case cover a period of some eight months. Thus, close attention to the sequence of events underlying this case is merited. At the time the article was published, the Petitioner, Joseph C. Graves, was a state senator and a candidate for mayor of the Lexington-Fayette Urban County Government. (Transcript of Evidence, hereinafter referred to as "TR", 24). Graves, however, had been a fixture in local politics for some time. He had been in public office since 1967, serving as a city commissioner, state representative and state senator. (TR 19-21). During these years in public life, Graves had as a matter of course filed with the county clerk documents which he identified as financial statements and tax returns (TR 25-26). His stated purpose for filing them at the county courthouse was to apprise his constituents of the nature and extent of his personal finances. (TR 143).

At the time he announced his candidacy for mayor Graves was very much aware that his personal finances, particularly his family's real estate holdings in downtown Lexington, were a legitimate campaign issue. In fact, questions about these property holdings had been raised in earlier campaigns (TR 33), and both Graves and his staff anticipated that questions would again be raised during the mayoral race. (TR 67). Their concern was not unwarranted. Graves' holdings had been a matter of public controversy throughout his career and his reputation for integrity, honesty and ethical conduct had been of public interest in the past. (TR 178-228).

After announcing that he was running for mayor, Graves filed on January 31, 1977, documents dated January 15, 1977 identified as "Joe Graves' Balance Sheet" (TR 104). After

[1] At the time the article was published, The Lexington Herald-Leader Company published two newspapers, the morning Lexington Herald, and the afternoon Lexington Leader. It also published combined editions on Saturday and Sunday. The Respondent merged the two newspapers at the beginning of 1983 and now publishes a single morning daily newspaper called The Lexington Herald-Leader.

these documents were filed, Graves authorized his campaign press secretary to send copies to The Lexington Herald-Leader Company (TR 104).

Near this time, two Lexington lawyers, Robert S. Miller and Timothy Green, made an effort to supply various documents to a reporter of The Lexington Herald-Leader Company. (TR 497, 526-527). These documents pertained to the nature and extent of the Graves family holdings and to the alleged conflicts of interest that had surrounded Graves throughout his career. The reporter contacted by the attorneys was John Alexander, a veteran reporter who had been with The Lexington Herald-Leader Company for seventeen and one-half years (TR 613), and who was familiar with the reporting of courthouse stories (TR 615). He was not only experienced, but he had the confidence of each of his editors. (TR 320, 368, 380, 487).

Alexander began working on the story in the winter of 1977. He brought the story to the attention of his editors after the May primary. (TR 318). According to Howard Collins, who was then editor of The Lexington Leader, Alexander approached him in June, 1977 and mentioned the information he had been given. At that time, Alexander did not identify his sources (TR 319, 625). Collins apparently authorized Alexander to continue his investigation of Graves' property holdings. (TR 625).

A few weeks later, Alexander came to Collins with a list of questions he had prepared based on the documents and his own investigation. Alexander told Collins that the list represented areas about which he wanted to question Graves and that a meeting between Alexander, Collins and Graves had been arranged. (TR 321). Graves cancelled the meeting, and instead wrote a letter to Collins and Alexander dated July 6, 1977 (TR 322), in which he proposed that they attend a previously scheduled press conference on July 22 (TR 34, 429). Graves then left for vacation and became unavailable for comment (TR 33).

After receiving Graves letter, Alexander wrote a story and submitted it to Collins (TR 631). Collins received the story on

July 15, the day he was scheduled to leave for vacation (TR 323). Before his departure, he read the article, made some editing changes and gave it to Rich Schwein, then city editor of The Lexington Leader. (TR 371). Collins instructed Schwein to carefully edit the story and to continue efforts to get Graves to talk to representatives of The Lexington Herald-Leader Company (TR 324). Alexander was also about to go on vacation, but he remained in touch with the newspaper and continued his own efforts to contact Graves (TR 575, 488).

On July 20, Alexander pursued his efforts to contact Graves, even going to Graves' home. He ultimately went to Graves' campaign headquarters to impress upon his campaign manager "the urgency of some communication with him." (TR 576), (TR 357, 576, 662). On July 21, Collins, who was still on vacation, received a telephone call from Fain, asking whether the story should be published. While Collins gave publication approval, he also told Fain to continue to try to contact Graves. (TR 325, 365). Another reporter in addition to Fain was assigned to solicit Graves' comments (TR 475).

Graves did not dispute the fact that numerous attempts were made by The Lexington Herald-Leader Company to contact him. To the contrary, although Graves had returned from his vacation on July 19, he and his staff made a campaign decision not to give the Respondent's reporters an individual meeting. (TR 424, 433). Yet at that time, Graves was aware that there were mistakes in the January 15, 1977 "Joe Graves Balance Sheet". In fact, his staff was preparing a press release and a set of documents to correct omissions in that financial statement and to answer questions about potential conflicts of interest. (TR 407-436). In spite of this knowledge, Graves and his staff chose to make the candidate unavailable to answer those questions until the Respondent's reporters were on "our [Graves Campaign] ground" during the press conference. (TR 535).

On July 21, three editions of The Lexington Leader were printed by the Respondent. The article in question, entitled "Graves' Property List Apparently Inaccurate," did not appear until the final edition because of continuing efforts to get

Graves' comments. This edition went to press at 1:00 p.m. (TR 771, 789). Later that same afternoon, Graves' staff held a press conference to denounce the story. The staff also hand-delivered a letter, signed by Graves' campaign manager, to Creed Black, publisher of the Lexington Herald-Leader Company (TR 282). Black then contacted the employees who had been involved in its writing, editing and publishing. (TR 284-294, 768).

Graves held his press conference the following day, as scheduled. The packet of material on which his staff had been working during the newspaper's efforts to contact him was distributed. The packet contained an addendum to Graves' financial statement as originally filed, correcting errors, mistakes and omissions. (TR 435, 459). On July 22 and 23, The Lexington Herald Leader Company reported both the news conference and the reactions of Graves' staff to Alexander's article.

The same day that Graves held his news conference, The Lexington Herald-Leader Company held the first in a series of meetings to reassess Graves' actual interest in the properties. (TR 764). Black became aware that despite further attempts to get Graves to go over the material, Graves had no intention of doing so. (TR 295, 298). Black therefore determined that the only way to verify the figures used in the July 21 story was to "examine them ourselves one by one." (TR 298). Towards that end, he requested The Lexington Herald-Leader attorneys to look at the documents and ascertain Graves' ownership interest. (TR 306).

The Respondent's attorneys conducted a title examination and held meetings with Black, Collins and Alexander, during which the extent of Graves' real estate holdings was reexamined. (TR 764, 756). A letter outlining Graves' percentage interests was sent to Collins by the attorneys. (TR 756-757). At this point, The Lexington Herald-Leader was still attempting to get Graves' to comment on his property interests, but he would not meet with Black or Collins (TR 764). The research into ascertaining Graves' interests took some time, as did the newspaper's continuing efforts to contact Graves.

On August 5, 1977, The Lexington Leader published an

article entitled "Graves' Property Story Wrong", incorporating the attorneys' findings as to the figures contained in Alexander's story (TR 332). That same day, an editorial was published in The Lexington Leader apologizing to Graves for the July 21 article. (TR 334).

None of the parties responsible for the writing, editing or publishing of the Alexander article wrote either the August 5 correction or the editorial. Steve Wilson, who was then managing editor of The Lexington Leader, took responsibility for writing the correction. (TR 333). Bill Hanna, associate editor of The Lexington Leader, wrote the editorial (TR 334). Further, as a result of their investigation, Black and Collins had concluded that the editors involved in the original article had improperly edited it and that Alexander should be discharged. Collins took the following remedial action: on July 30, Alexander was dismissed; both Schwein, the city editor and Alexander's direct supervisor, and Bette Pierce, the assistant city editor, were demoted.

Following the August 5 news story and editorial, Collins still had questions concerning the nature and extent of Graves' property holdings. (TR 348). Since Graves had said publicly that he would be glad to meet with an interviewer following the August 5 publications, Collins hoped that a meeting could be arranged. (TR 350). His efforts to talk to Graves were once again thwarted by Graves and his staff, and no one from The Lexington Herald-Leader Company was ever able to question Graves about his property holdings (TR 349-352, 765-766).

The Complaint was filed in the Fayette Circuit Court on July 19, 1978 and the matter came to trial on July 13, 1981. At trial, every witness who was asked testified that Alexander had never questioned his story's accuracy. (TR 305, 347, 365, 367, 379, 381, 487, 513, 554, 755, 769, 788). Alexander testified that his only doubt about the story's completeness, (TR 572), arose solely from the fact that he had been unable to discuss the documents with Graves (TR 575, 645). He stated unequivocally that he was writing the best story he could and that he

believed his story was factually true. (TR 639, 653). Further, Alexander testified that "he did not knowingly write anything false." (TR 687).

After motions for directed verdicts were overruled, the jury found unanimously that not all of the statements of fact contained in the July 21 article were substantially true, and that the false statements of fact were defamatory. The jury returned a nine-to-three verdict that The Lexington Herald-Leader Company or some of its employees had published the July 21 article with "actual malice" and awarded damages to Graves in the amount of $100,000 (TR 841-43).

The Lexington Herald-Leader Company appealed and the Kentucky Supreme Court reversed, by a five-to-two vote. (Petitioner's App. 18a). The issue on appeal was "whether the evidence in the record is sufficient to support the jury's finding that the article was published with actual malice, as defined in *New York Times Co. v. Sullivan.*" (Petitioner's App. 10a). In so reviewing the evidence, the Kentucky Court noted that since *New York Times v. Sullivan,* 376 U.S. 254 (1964), appellate courts are under a mandate to "make an independent examination of the whole record, . . . so as to assure ourselves that the judgment does not constitute a forbidden intrusion on the field of free expression." (Petitioner's App. 10a). The Kentucky Court carefully pointed out that such a *de novo* review did not mean that it was free to disregard the jury's verdict. Rather, it recognized its duty to draw "all permissible inferences in the Plaintiff's favor" and to resolve "all questions of credibility in his behalf." (Petitioner's App. 11a).

The Kentucky Court nonetheless held that the proof presented on the issue of actual malice lacked "the convincing clarity" required by *Sullivan.* (Petitioner's App. 11a). In so doing, the Appellate Court noted that decisions of this Court following *Sullivan* had further defined actual malice to mean that the defendant published the article despite having had "a conscious awareness of probable falsity" or having "in fact

entertained serious doubts as to the truth of his publication." (Petitioner's App. 13a).[2] Looking at the record below, the Kentucky Court found that Alexander's doubts about his story were not about the accuracy of his analysis of Graves' property holdings. Instead, the Court found that Alexander's concerns stemmed solely from his inability to get Graves' comments, which did not rise to "a high degree of awareness of [the] probable falsity of the article." (Petitioner's App. 14a). The Opinion noted that while the First Amendment is not served by lies or false statements, neither would it be served by affirming the judgment below on the evidence in the record. (Petitioner's App. 18a).

Graves sought a rehearing of the appellate ruling, but his petition was denied. (Petitioner's App. 26a).

REASONS FOR DENYING THE WRIT

SUMMARY OF ARGUMENT

Under the considerations set forth in U.S. Sup. Ct. R. 17, the decision of a state court of last resort may be reviewed when it has decided a federal question in a way which conflicts with decisions of this Court, a federal court of appeals or another state court of last resort. Graves' case presents none of these three situations, nor does his petition offer any other valid reasons for this Court to grant review.

For nearly two decades, following its decision in *New York Times v. Sullivan*, 376 U.S. 254 (1964), this Court has adhered to a doctrine of appellate review as a means of reversing defective judgments subject to constitutional principles. In accordance with this mandate, both lower federal and state courts have almost uniformly applied a heightened standard of appellate review in constitutional libel actions. Petitioner's tortured assertions to the contrary badly miss the mark. The review of the record by the Kentucky Supreme Court was wholly consistent with *Sullivan* and its progeny.

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[2] Curtis Publishing Co. v. Butts, 388 U.S. 130 (1967); Beckley Newspaper Corp. v. Hanks, 389 U.S. 81 (1967); St. Amant v. Thompson, 390 U.S. 727 (1968).

Further, the Kentucky Court's rendering of a decision based on insufficient proof of "actual malice" was similarly consistent with decisions of this Court. The state court's definition of "reckless disregard for the truth" does not require a public official or public figure to prove falsity, and Petitioner's argument to that effect is based on a misreading of the opinion.

Petitioner's other arguments likewise fail to show any deviation by the Kentucky Court from the accepted and usual course of judicial proceedings. This case utterly fails to merit this Court's further attention.

1. DECISIONS OF THIS COURT, AS WELL AS DECISIONS IN LOWER FEDERAL AND STATE COURTS, MANDATE AN INDEPENDENT APPELLATE REVIEW IN CONSTITUTIONAL LIBEL ACTIONS, PARTICULARLY WHERE THE LEGAL ISSUE UNDER CONSIDERATION IS ACTUAL MALICE

Petitioner contends that this case presents "the question of the extent to which an appellate court may re-examine the evidence presented to a jury in a public figure libel case." (Petition, p. 11). He further contends that this same issue is already before this Court in a federal bench trial context in *Bose v. Consumer's Union of United States,* No. 82-1246 (October Term, 1982), *cert. granted,* 103 S. Ct. 1872 (1983), *opinion below,* 692 F.2d 189 (1st Cir. 1982). (Petition, p. 11). Petitioner's attempt to analogize the instant case to *Bose* is utterly unwarranted because the two cases bear no resemblance to each other.

As Petitioner admits, *Bose* is a product disparagement case (Petition, p. 11), while the instant case revolves around a candidate for public office. The stake of a vital democratic society and its people in the public business and in the conduct of public officials and candidates for such offices is necessarily involved in an article about a political candidate. *St. Amant v. Thompson,* 390 U.S. 327, 371 (1968). Manifestly, no such stake is involved in a consumer review of a stereo loudspeaker system. Moreover, it is clear that at least one concern before this Court in *Bose* must be the issue of whether the review was

an expression of fact or an expression of constitutionally protected opinion under *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974). No such issue is presented by the petition here. The fact that this Court granted review in *Bose* does not lead *ipso facto* to a conclusion that review is likewise appropriate in the instant case.

More importantly, petitioner ignores the fact that since *New York Times v. Sullivan*, this Court has unequivocally mandated independent appellate review in public figure libel cases.[3] Time and again, this Court has adhered to the principle that an appellate court's duty goes beyond the mere elaboration of constitutional principles:

> [W]e must also in proper cases review the evidence to make certain that those principles have been constitutionally applied . . . [and] 'examine for ourselves the statements in issue and the circumstances under which they were made to see . . . whether they are of a character which the principles of the First Amendment, as adopted by the Due Process Clause of the Fourteenth Amendment, protect' . . . We must 'make an independent examination of the whole record' so as to assure ourselves that the judgment does not constitute a forbidden intrusion on the field of free expression.

New York Times v. Sullivan, 376 U.S. at 285 [citation and footnote omitted].

One of the Court's last pronouncements on the role of an appellate court in a public offical/public figure libel case was in *Time, Inc. v. Pape*, 401 U.S. 279 (1971). In *Pape*, the plaintiff was a public official by virtue of his position as Deputy Chief of

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[3] Rosenblatt v. Baer, 383 U.S. 75 (1966); Beckley Newspapers Corp. v. Hanks, 389 U.S. 81 (1967); Associated Press v. Walker and Curtis Publishing Co. v. Butts, 388 U.S. 130 (1967); Time, Inc. v. Hill, 385 U.S. 374 (1967) (invasion of privacy); St. Amant v. Thompson, 390 U.S. 727 (1968); Greenbelt Cooperative Publishing Ass'n. v. Bresler, 378 U.S. 6 (1970); Rosenbloom v. Metromedia, 403 U.S. 29 (1971); Time, Inc. v. Pape, 401 U.S. 279 (1971); National Association of Letter Carriers v. Austin, 418 U.S. 264 (1974) (libel claim under federal labor laws).

Detectives of the Chicago Police Department. When that case ultimately came before this Court, the only issue was whether the appellate court had correctly applied the actual malice doctrine to the facts before it. In ruling on that issue, the Court specifically referred to the "settled principle" that in cases where constitutional rights are allegedly denied, the appellate court must re-examine the evidentiary basis on which the lower court decision was founded. It further noted:

> [I]n cases involving the area of tension between the First and Fourteenth Amendments on the one hand, we have frequently had occasion to review 'the evidence in the . . . record to determine whether it could constitutionally support a judgment' for the plaintiff.

401 U.S. at 284 (citations omitted). Thus, the Kentucky Supreme Court did not act in contravention of this Court's constitutional libel decisions, but wholly in accord with them.

Further, it must be remembered that this Court's adoption of a heightened appellate review in *New York Times v. Sullivan* was not without precedent. The Supreme Court had previously mandated independent appellate review to assure the protection of constitutional rights in many contexts, including cases involving obscenity, freedom of assembly, disorderly conduct, boycott, contempt of court, freedom of expression in public schools and expression of rights of public employees.[4] In the years following *Sullivan*, this Court has continued to require an independent review in cases involving constitutional rights. Thus, as recently as April, 1983, in *Connick v. Myers*, 51 U.S.L.W. 4436 (1983), a case involving public employees, this Court reiterated the mandate that has compelled appellate courts to independently review the record in cases involving the First Amendment:

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[4] *See, e.g.* Jacobellis v. Ohio, 378 U.S. 184, 189 (1964) (obscenity); Edwards v. South Carolina, 372 U.S. 229, 235 (1963) (assembly); Niemotko v. Maryland, 340 U.S. 268, 271 (1950) (disorderly conduct); Pennekamp v. Florida, 328 U.S. 331, 335 (1946) (contempt).

> The Constitution has imposed upon this Court final authority to determine the meaning and application of those words of that instrument which require interpretation to resolve judicial issues. With that responsibility, we are compelled to examine for ourselves the statements in issue and the circumstances under which they are made to see whether or not they . . . are of a character which the principles of the First Amendment, as adopted by the Due Process Clause of the Fourteenth Amendment, protect.

51 U.S.L.W. at 4439, p. 10 (citations omitted).

Finally, despite Petitioner's labored contention that *Gertz v. Robert Welch, Inc., supra,* sounded the death knell for independent appellate review, he grievously misconstrues the case. *Gertz* was not granted certiorari for the purpose of questioning the appellate court's independent review, since this Court assumed therein that the Seventh Circuit had correctly found insufficient evidence in the record of actual malice. Instead, this Court took *Gertz* to consider the appropriate standard of liability for private figures, and only that point was before the Court. Whatever the scope of review now appropriate in *private figure* cases, the inescapable fact is that the doctrine of independent appellate review in *public official-/public figure actual malice* cases has been left intact.[5] Petitioner's attempts to avoid that fact are totally without merit. In reviewing the record below, therefore, the Kentucky Supreme Court did not usurp the function of the jury. Instead, it followed

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[5] Further proof of this Court's adherence to this doctrine is found in National Association of Letter Carriers v. Austin, 418 U.S. 264 (1974), decided the same day as *Gertz*. *Austin* involved a libel claim brought under federal labor laws and the standard of proof was actual malice. This Court once again echoed its prior mandate to make an independent examination of the whole record in order to ensure that constitutional rights were properly protected. 418 U.S. at 282.

the long and honored mandate of this Court[6] that the jury may not be allowed to reach a conclusion which is inconsistent with the United States Constitution. The Kentucky Supreme court was required to do no less.[7]

2. THE HOLDING OF THE KENTUCKY SUPREME COURT THAT THERE WAS INSUFFICIENT EVIDENCE TO SUPPORT A FINDING OF ACTUAL MALICE WAS ENTIRELY CONSISTENT WITH *NEW YORK TIMES V. SULLIVAN* AND ITS PROGENY

It was undisputed at trial that Graves was, at minimum, a public figure and that his burden under *New York Times Co. v. Sullivan* was to prove that The Lexington Herald-Leader Company published the July 21, 1977 article with actual malice. The Kentucky Supreme Court's recitation of the refinement given the term "actual malice" in the years since *Sullivan* is

[6] Nor can any credence be given to Petitioner's assertion that there is sufficient confusion in the federal courts to warrant review under U.S. Sup. Ct. R. 17(b). Independent appellate review in constitutional libel cases has been nearly universally accepted in the lower federal courts. *See, e.g.* Buckley v. Littell, 539 F.2d 882 (2d Cir. 1976), *cert. denied,* 429 U.S. 1062 (1977); Baldine v. Sharon Herald Company, 391 F.2d 703 (3rd Cir. 1968); Ryan v. Brooks, 634 F.2d 726 (4th Cir. 1980); Long v. Arcell, 618 F.2d 1145 (5th Cir. 1980), *cert. denied,* 449 U.S. 1083 (1981); Orr v. Argus-Press, 586 F.2d 1108 (6th Cir. 1978), *cert, denied,* 440 U.S. 960 (1979); Gertz v. Robert Welch, Inc., 471 F.2d 801 (7th Cir. 1972), *rev'd on other grounds,* 418 U.S. 323 (1974); Pauling v. Globe-Democrat Publishing Co., 362 F.2d 188 (8th Cir. 1966), *cert. denied,* 388 U.S. 909 (1967); Cher v. Forum International, Ltd., 692 F.2d 634 (9th Cir. 1982), *cert. denied,* 51 U.S.L.W. 3883 (1983) and Davis v. Schuchat, 510 F.2d 731 (D. C. Cir. 1975).

Moreover, Guam Federation of Teachers v. Ysrael, 492 F.2d 438 (9th Cir. 1974), *cert. denied,* 419 U.S. 872 (1974), was miscited by Petitioner for the proposition that independent appellate review is not required under *Sullivan. Guam* cited *Sullivan* in regard to independent review and language indicating otherwise was specifically limited to the question of directing a verdict.

[7] In E. W. Scripps Co. v. Cholmondelay, 569 S.W.2d 700 (Ky. App. 1978), the Kentucky Court recognized that after *Gertz,* states may not allow punitive damages unless actual malice is proven. In overturning the award of punitive damages, the Court looked at the "whole record," finding that the record had not indicated substantial evidence of actual malice. 569 S.W.2d at 703, 704. Thus, Kentucky appellate courts have a tradition of independent review where there is an actual malice standard.

entirely correct and stands unrefuted by Petitioner. Petitioner's only quarrel is with the Kentucky Court's final choice of words; i.e.: that "liability may rest only on conduct which approaches the level of deliberate fabrication . . . " (Petitioner's App. 14a).

In making his argument, Petitioner has ignored the obvious. The operative word in the Kentucky Court's definition is *"approaches"*. Even a cursory reading of the court's phrasing indicates that a libel defendant can incur liability well *before* the point of deliberate fabrication. Moreover, Petitioner has also ignored the state court's full explanation of its formulation: that "the defendant must entertain serious doubts (i.e.: be consciously aware of his allegations' probable falsity) and publish despite those serious doubts." (Petitioner's App. 14a). Far from straying from the intent of *Sullivan, St. Amant v. Thompson* and *Curtis Publishing Co. v. Butts,* the Kentucky Court echoed the words of this Court in reaching the result it did. Thus, a public official or public figure in Kentucky is required to prove no more than this Court has required for almost twenty years.

Moreover, the Kentucky Supreme Court's review of the evidence clearly refutes Petitioner's contention that the verdict was overturned only because he could not demonstrate conscious falsity on the part of The Lexington Herald-Leader Company. To the contrary, the verdict was overturned because Petitioner failed to demonstrate a reckless disregard for the truth.

Petitioner makes much of the fact that the Kentucky Supreme Court was required to accept Alexander's testimony as credible and to resolve all inferences in the plaintiff's favor. (Petition p. 20). There is absolutely no evidence that the Kentucky Court did otherwise. While Petitioner would have this Court believe to the contrary, the fact remains that every editor connected with the July 21, 1977 article had confidence in Alexander's ability as a reporter. None of them had any reason to belive that Alexander needed assistance with the legal documents in his possession, since he had already ascertained

the percentage of Graves' property holdings. (TR 632). Alexander testified at trial that he believed his story was factually true and that his only doubts stemmed from his inability to discuss the subject matter with Graves himself. (TR 575, 639, 645, 652-653).

Nor did the Kentucky Court err in its finding that The Lexington Herald-Leader Company was not required to postpone publication until after Graves' press conference. (Petitioner's App. 16a). First, the presence of "hot news" would have been a justification from the standpoint of Alexander's superiors, but the jury itself found that Howard Collins, the editor, had not published the article with actual malice. Since there was, even from the jury's standpoint, insufficient evidence of actual malice on that point in the record, the existence or nonexistence of hot news is therefore not at issue.

Even if this were a hot news case, it became one solely because of Graves' politically motivated desire to confine any inquiry into conflict of interest charges to a press conference. Yet the record is replete with evidence that rather than ignoring "elementary precautions", *Curtis v. Publishing Co. v. Butts, supra,* The Lexington Herald-Leader Company did everything it could to get Graves' comments. Not only was another reporter sent to get a comment from Graves (TR 475), but the decision to publish was made fifteen minutes after the normal deadline (TR 477). Following publication, the Respondent made concerted and continued efforts to get Graves' side of the story (TR 349-352, 765-766). These efforts simply did not exhibit a "reckless 'I-don't-care-about-the-truth' state of mind" which would have met the actual malice standard. *Orr v. Argus-Press Co.*, 586 F.2d 1108 (6th Cir. 1978), *cert. denied,* 440 U.S. 960 (1979).

The Kentucky Court was also correct in holding that the existence of two of Graves' political enemies as Alexander's sources was insufficient proof of actual malice. (Petitioner's App. 15a-16a). Unlike the evidence in *St. Amant v. Thompson, supra,* the record in the instant case did not show that Alexander relied solely on his sources or that he failed to try to verify the documents on his own. There was no evidence that the story was completely fabricated or that the allegations were so "inherently improbable that only a reckless man would have put them in circulation." *St. Amant v. Thompson,* 390 U.S. at 732. It should be noted that Graves' own staff ultimately filed an addendum to his January 15, 1977 property schedule. Respondent should not be punished for publishing an article based on the original list which was, at minimum, incomplete. (TR 125-126, 135, 435, 439). Reckless disregard for the truth of the article in question was not proven with convincing clarity.

Finally, despite Petitioner's assertions, neither his constitutional rights nor those of the electorate were denied by the Kentucky Supreme Court. Petitioner's contentions on these grounds are disingenuous. This Court has already recognized in *New York Times v. Sullivan* that the Seventh Amendment does not preclude an appellate court from reviewing a state court decision to determine if a federal right has been adequately protected. 376 U.S. at 285, n. 26. The review of a jury verdict in a libel case is not a violation of the Fourteenth Amendment, but a protection of the First Amendment. Therefore, whether a cause of action is "property" for due process purposes is irrelevant to Graves' petition for certiorari.

Petitioner's assertion of the rights of the electorate is equally specious. Petitioner's standing to argue on behalf of the public at large is on shaky ground. *Cf. Village of Arlington Heights v. Metropolitan Housing Development Corp.,* 429 U.S. 252 (1977). Even if Petitioner has the requisite standing, there is no evidence that the public's right to an effective, unimpeded vote was undermined by the July 21, 1977 article. Graves' campaign manager declined to say at trial that the election outcome would have been different had the article not been printed (TR 393). Moreover, this Court has made it clear that

a candidate for public office cannot claim malice simply because aspects of his life have been examined in print and presented to the voting public:

> The principal activity of a candidate in our political system, his 'office,' so to speak, consists in putting before the voters every conceivable aspect of his public and private life that he thinks may lead the electorate to gain a good impression of him. A candidate who, for example, seeks to further his cause through the prominent display of his wife and children can hardly argue that his qualities as a husband or father remain of 'purely private' concern. And the candidate who vaunts his spotless record and sterling integrity cannot convincingly cry 'Foul!' when an opponent or an industrious reporter attempts to demonstrate the contrary.

Monitor Patriot Co. v. Roy, 401 U.S. 265, 274 (1971). Petitioner may have been dissatisfied with the outcome of the election, but there is no evidence that the outcome represented anything but the will of the electorate. His loss was a matter of public choice and clearly not attributable to any "reckless disregard" on the part of The Lexington Herald-Leader Company.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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No. 83-619

IN THE
Supreme Court of the United States
OCTOBER TERM, 1983

JOSEPH C. GRAVES,
Petitioner,

v.

THE LEXINGTON HERALD-LEADER COMPANY,
Respondent

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF KENTUCKY

PETITIONER'S SUPPLEMENTAL AND REPLY BRIEF

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TABLE OF AUTHORITIES

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ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF KENTUCKY

PETITIONER'S SUPPLEMENTAL AND REPLY BRIEF

Petitioner replies briefly to the second argument in Respondent's Brief in Opposition, and comments upon the effect of this Court's decision in *Bose Corp. v. Consumers Union of United States, Inc.*, No. 82-1246 (April 30, 1984).

I.

Respondent's second argument (Brief

in Opposition at 13-17) seeks to defend the Kentucky Supreme Court's definition of the actual malice standard as requiring plaintiff to prove "deliberate fabrication." Pet. at 17-20. Yet in *Herbert v. Lando*, 441 U.S. 153, 160 (1979), this Court reiterated its holding that actual malice encompassed more than deliberate falsehood. The Court held that it was sufficient that "the alleged defamer of public officials ... have reason to suspect that his publication is false." *And see* the cases cited at Pet. 18-19. Moreover, in a recent state Supreme Court decision, *Green v. Northern Publishing Co., Inc.*, 655 P.2d 736 (Alaska 1982), the court held the requirement of actual malice satisfied if "the defendant entertained serious doubts about the truth of its assertion ...." *Id.* at 743, and held it sufficient that "the writers ... knew of substantial

evidence" which contradicted their published assertions, *id.* at 742.

This case falls squarely within that definition of actual malice: including reckless disregard of whether the story was false or not. Here the testimony was specific that the writer himself had doubts as to the accuracy of the story he had written, and which the respondent publisher rushed into print; impelled, in the words of one of the newspaper's editors, by a "stampede instinct." Pet. at 6.

II.

These same facts also call for this Court's review in light of its decision in *Bose*. As the Court noted, "the constitutional values protected by the [*New York Times*] rule make it imperative that judges -- and in some cases judges of this Court -- make sure that it is *correctly* applied." Slip op. at 16 (emphasis added). Here, as in *Bose* and the cases which *Bose* follows,

the Court should conduct, as it "has regularly conducted [,] an independent review of the record ... to be sure that the speech in question actually falls within the unprotected category ...." *Id.* at 19. Here, unlike in *Bose*, "the evidence in the record ... is of the convincing clarity required to strip the utterance of First Amendment protection," and hence "[j]udges, as expositors of the Constitution, must independently decide whether the evidence in the record is sufficient to cross the constitutional threshold that bars the entry of any judgment that is not supported by clear and convincing proof of 'actual malice'." *Id.* at 24-25.

Thus, in *Bose* this Court examined the record in order to find that the Court

of Appeals in that case was correct in finding that the evidence there lacked ~~in~~ the convincing clarity necessary to support a finding of actual malice. Slip op. at 25-28. The Court found that the evidence did "not establish that he [the respondent's audio engineer] realized the inaccuracy at the time of publication," *id.* at 26, and hence the statement was "the sort of inaccuracy that is commonplace in the forum of robust debate ...." *Id.* at 27.

In this case, quite to the contrary, the author of the article which defamed a candidate for public office -- and which was influential in the results of the election, Pet. at 24-25 -- admitted not only that he did not understand the complex subject matter about which he wrote, but that he had specific doubts about the

accuracy of what he had written *before* it was published. *Id.* at 6-7. Here too, the publisher also was aware that the principal sources of the article were political opponents of the petitioner and were "out to get" him. *Id.* at 7.

Taken together, these facts more than satisfy any actual malice standard short of that which the Kentucky Supreme Court demanded: "deliberate fabrication." A proper application of the standards which this Court announced anew in *Bose*, and the proper instruction of both federal appel-

late courts and state courts of last resort, which is one of this Court's great functions, compel review of this case.[1]

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1 As noted, this case also presents an important constitutional question not present in *Bose* and, as far as petitioner is aware, one that this Court has never yet addressed; that is, the effect to be given, in a defamation case in which an election is involved, to the First Amendment interests implicated by the right to vote. *See* Pet. at 7, 24-25.